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Supreme Court of the United States

OCTOBER TERM, 1983

DRAVO MECHLING, INC., POINT LANDING, INC., ZITO FLEETING, INC., ZITO TOWING, INC., and HIGHLANDS INSURANCE COMPANY,
Petitioners,

versus

COMBI LINES and UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a non-owner of a vessel who negligently causes that vessel to sink in navigable waters is liable for damage to another vessel which subsequently collides with the wreck either directly to the owner of the damaged vessel or for contribution or indemnity to the owner of the wreck and/or the United States, who have negligently failed to mark or remove the wreck?

LIST OF PARTIES TO PROCEEDING IN THE COURT OF APPEALS

All parties to the proceeding in the court of appeals are listed in the caption of the case in this Court.[1]

Dravo Mechling, Inc. is a subsidiary of Dravo Corporation. Affiliate corporations are: Dravo Engineers, Inc.; Dravo Constructors, Inc.; Gibbs & Hill, Inc.; Dravo Van Houten, Inc.; Weyher/Livsey Constructors, Inc.; Dravo Natural Resources Company; Dravo Basic Materials Company; Dravo Lime Company; Dravo Coal Company; Ryan-Walsh Stevedoring Company, Inc.; Southern Steamship Agency, Inc.; Dravo Marine Equipment Company; Dravo Wellman Company; Alrem (Societe Algerienne de Realizations et d' Etudes Minieres); Dravo Australia; Dravotec, S. p. A.;

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1. While all parties to the proceeding before the Court of Appeals are listed in the caption, there are numerous other parties in the proceedings before the trial court. These include:

1. Federal Barge Lines, Inc.
2. Lykes Bros. Steamship Co., Inc.
3. Midland Enterprises, Inc.
4. Admiral River Towing Co., Inc.
5. Certain Underwriters at Lloyd's London
6. Employers Insurance Company of Wausau
7. Arkwright - Boston Manufacturers Mutual Insurance Company
8. Cravens, Dargen & Co.
9. Tenneco Oil Company
10. Insurance Company of North America
11. Hapag-Lloyd A. G. (one of the entities making up Combi Lines)
12. Holland-American Lines Freight, B. V. (one of the entities making up Combi Lines)
13. Inter-Continental Transport, B. V. (one of the entities making up Combi Lines)
14. Sea Unity Shipping, S. A.
15. Estrella Leal Navigacion, S. A.

CEI (Compagnia Elettrotecnica Italiana, S.p.A.); Dravo Costruttori, S.p.A.; Gibbs & Hill Espanola, S.A.; F. C. de Weger International B. V.; IWACO B. V. (International Water Supply Consultants); Filipinas Dravo Corporation; GIBSIN Engineers, Ltd.; P. T. Triweger; Chuchawal de Weger Internationaal Ltd.; Dravo - Okura Co., Ltd.; Dravo de Mexico, S. A. de C. V.; Dravo Arabia Limited.

Point Landing, Inc. was merged in 1979 into Wood Resources, Inc., a privately owned Louisiana corporation based in New Orleans.

Affiliates of Zito Fleeting, Inc., and Zito Towing, Inc., are Intercoastal Repair Service, Inc. and Zito Metcalf Drydock, Inc.

The parent of Highlands Insurance Company is Halliburton Company. Affiliates of Highlands Insurance Company operating in the United States are Brown & Root, Inc.; Otis Engineering Corporation; Jackson Marine, Inc.; Highlands Underwriters Insurance Company; Underwriters Special Risks, Inc.; and Taylor Diving & Salvage Co., Inc.

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The opinion of the Court of Appeals for the Fifth Circuit en banc, dated March 19, 1984, is reported at 727 F.2d 455 (5th Cir. en banc 1984). The panel opinion, dated February 4, 1983, is reported at 696 F.2d 1141 (5th Cir. 1983). The decision of the District Court for the Eastern District of Louisiana, dated April 20, 1981, is reported at 513 F. Supp. 720 (E.D. La. 1981). The caption of all three opinions is *Nunley v. M/V DAUNTLESS COLOCOTRONIS*.

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit en banc was rendered on March 19, 1984, and judgment was entered on the same day. No order has been entered respecting a rehearing or granting an extension of time within which to petition for certiorari, but an order has been entered staying the issuance of the mandate to and including June 17, 1984. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

STATUTES INVOLVED

The only statute that this case involves is section 15 of the Rivers and Harbors Act, also known as The Wreck Act, which is codified as 33 U.S.C. §409 and which provides in pertinent part as follows:

> It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels. . . . And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise,

> it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to so so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

STATEMENT OF THE CASE

The actual facts upon which this litigation is based are subject to substantial dispute and may never be conclusively determined. Fortunately, however, such a determination is not necessary for the resolution of the issues presented by this petition, as a relatively few conclusionary facts which are established by the pleadings are determinative of the present issue.

On January 14, 1974, the LASH barge CBLL-01315, owned by Combi Lines, Hapag-Lloyd A. G., Holland American Line Freight, B. V., and Inter-Continental Transport, B. V. (hereinafter referred to as "Combi"), sank in the Mississippi River during a major breakaway of a large number of barges from various fleeting areas in the New Orleans area. The sinking was not caused by any negligence or fault on behalf of the barge or respondents Combi or the United States, but rather it is assumed for the purposes of the issue

involved herein that the sinking was caused by the negligence of petitioners Dravo Mechling, Inc.; Point Landing, Inc.; Zito Fleeting, Inc.; Zito Towing, Inc.; and Highlands Insurance Company (hereinafter referred to as "the upriver defendants"). On July 22, 1977, over three and a half years after the sinking of the barge, the M/V DAUNTLESS COLOCOTRONIS ("the DAUNTLESS"), upbound on the Mississippi River, struck the sunken Combi barge, which was unmarked at the time, and was damaged thereby.

The phase of the resulting litigation which is involved in this petition was commenced in the United States District Court for the Eastern District of Louisiana by the filing by Combi of a complaint seeking exoneration from or limitation of liability. The owners and operators of the DAUNTLESS filed an answer in that proceeding and a claim against Combi seeking to recover damages arising out of the alleged constructive total loss of the DAUNTLESS. Subsequently, the DAUNTLESS interests filed a separate complaint against the United States of America and certain of the upriver defendants seeking to recover the same damages. The United States filed a separate complaint against certain of the upriver defendants seeking to recover its costs incurred in marking and removing the wreck and also seeking to recover contribution and/or indemnity for any amounts it might be held liable to pay to the DAUNTLESS interests. Combi likewise filed a third-party complaint against the upriver defendants seeking contribution and/or indemnity for any amount it might be held liable to pay to the DAUNTLESS interests and tendering the upriver defendants to the Dauntless interests pursuant to Rule 14(c) of the Federal Rules of Civil Procedure. Jurisdiction of these actions in the district court was based upon 28 U.S.C. §1333 and 46 U.S.C. §185.

These various lawsuits were all consolidated, and the upriver defendants moved the court pursuant to Rule 12 of

the Federal Rules of Civil Procedure to enter judgment on the pleadings dismissing with prejudice all claims, complaints, cross-claims, and third-party complaints against all upriver defendants insofar as said claims sought any recovery for the losses and damages occurring as a result of the alleged striking of the Combi barge by the DAUNTLESS, whether said recovery was sought directly by the party initially suffering the damages or by any other party seeking contribution or indemnity. The upriver defendants did not seek judgment dismissing any claims against them for the costs of marking or removing the Combi barge.[2] At the hearing on the upriver defendants' motion, the DAUNTLESS interests announced that they did not oppose the granting of the motion, and in fact they served on that date a voluntary dismissal of their claims against all parties whom they had sued other than Combi and the United States. On April 20, 1981, the district court granted the motion of the upriver defendants dismissing the claims against them. Combi and the United States appealed to the Court of Appeals for the Fifth Circuit, but the DAUNTLESS interests, having previously filed their motion to dismiss their claims against the upriver defendants, did not appeal. On February 4, 1983, a divided panel of the appellate court vacated the district court's opinion and remanded the case. A petition for rehearing en banc was subsequently granted on April 6, 1983, and on March 19, 1984, the court of appeals en banc, with Judges Williams and Gee dissenting, reversed the district court's holdings and remanded the case for further proceedings. Subsequently, the court of appeals has stayed issuance of the mandate through and including June 17, 1984.

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2. Likewise the motion of the upriver defendants did not relate to the various other claims which arose out of the breakaway of January 14, 1974, as all the claims for damages to barges, ships, cargoes, and various shoreside facilities resulting from that incident, including the claims for the loss of the Combi barge and its cargo, had been settled.

ARGUMENT

Prior to the decisions of the Fifth Circuit in this case, there was no reported decision holding a non-owner of a vessel who had negligently caused that vessel to sink in navigable waters responsible for damages resulting from another vessel's subsequently colliding with the wreck. To the contrary, there was an established and uncontradicted line of jurisprudence extending back for over seventy-five years which had held unequivocally that a negligent non-owner was not responsible for damage to a vessel which subsequently collided with the sunken wreck. *The ANNA M. FAHY*, 153 F. 866 (2d Cir. 1907); *The R. J. MORAN*, 299 F. 500 (2d Cir. 1924); *Red Star Towing & Transportation Co. v. Woodburn*, 18 F.2d 77 (2d Cir. 1927); *Lowery v. The Tug ELLEN S. BOUCHARD*, 128 F. Supp. 16 (N.D.N.Y. 1955), *aff'd on opinion of trial court*, 229 F.2d 436 (2d Cir. 1956); *American Commercial Barge Line Company v. Eagle Marine Industries, Inc.*, 1977 A.M.C. 475 (E.D. Mo. 1976). In each of these decisions, the court unequivocally held that section 15 of the Wreck Act of March 3, 1899, now codified as 33 U.S.C. §409, placed the sole liability for marking and removing a wrecked vessel on her owner and that the party responsible for negligently sinking the wreck was exculpated from liability for a subsequent collision with the wreck.[3]

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3. As noted in both the panel opinion, 696 F.2d at 1144 n. 6, and the en banc opinion, 727 F.2d at 460-62, the United States can be liable under certain circumstances for a failure to mark or remove a sunken vessel. With respect to the present issue, however, it is unnecessary to determine whether or not under the facts of this case the United States was responsible to mark or remove the wreck, but it is only necessary to realize that the possibility exists that it might be. For clarity of discussion, the argument presented here will focus on the liability of the owner of the sunken vessel rather than on the liability of the United States, but the legal issue involved is the same whether the United States or the owner or both were negligent in failing to mark and/or remove the sunken barge.

Perhaps the clearest of these decisions is that of Judge Learned Hand in the *Red Star Towing* case, which involved an unusual factual twist. The libelant Red Star, owner of the tug STAMFORD, which was towing the barge JOE when the barge JOE struck the sunken barge HAYWARD, was also the owner of the tug PORTCHESTER, which had negligently sunk the barge HAYWARD two days before. The trial court had awarded Red Star only one-half of its provable damages after concluding that it was at fault for failing to give proper information as to the whereabouts of the sunken barge HAYWARD. In reversing the trial court and awarding Red Star full damages, the Second Circuit stated as follows:

> As to the libelants' liability, we differ with the learned District Judge. It must be remembered that the tugs do not share in the duty to mark the wreck, whatever their fault for causing it. The Anna M. Fahy, 153 F. 866 (C. C. A. 2); The R. J. Moran, 299 F. 500 (C. C. A. 2). The libelants were therefore not liable for failing to secure more information than they had, nor were they responsible that that information turned out to be misleading. They reported what they had from the master, and were not charged with getting more, or with the truth of what they did get, in the absence of deceit, which is not suggested.
>
> So far as we know, this is the first case in which the libelant is the same party which has suffered by the very wreck which his own negligence occasioned, and at first blush it appears that he should bear his part of the ensuing loss, to which he so contributed.

> However, a tug which negligently sinks a vessel is not liable to subsequent craft which may foul the wreck, either for failing to mark it, or because the second collision is a proximate consequence of the first fault. A tug-owner is no more responsible for the eventual collision, when he himself suffers from his earlier fault, than when another is the victim. The statute establishes a new duty arising after the sinking, and demanding as its condition nothing but the fact and notice of it to the wreck owner. Though the tug be a guilty party to the original mishap, the duty is not ordinarily upon her to provide against further loss; the statute imposes the duty upon the owner alone, and absolves the tug from subsequent consequences, which conceivably might otherwise be thought to be the proximate result of her original fault. [18 F.2d at 79.]

The Fifth Circuit, in its en banc decision, attempts to reconcile its decision with prior jurisprudence. 727 F.2d at 466. Such a reconciliation, however, is clearly impossible and is not supported by any of the cases cited. In *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975), the only parties to the suit were the United States and the owner of a vessel which struck a wreck, and there was not even any mention of there being a negligent non-owner of the wreck. In *Ingram Corporation v. Ohio River Company*, 505 F.2d 1364 (6th Cir. 1974), the owners of a barge and her cargo which were both damaged as a result of striking a wreck sued the owner of the wreck. The owner of the wreck was found negligent in causing the wreck (which would have defeated any claimed right to abandon), and there was no

contention of there being any party other than the owner who was negligent in causing the wreck. Furthermore, the discussion of the negligence of the defendant in that case deals almost entirely with the defendant's negligence in failing to properly mark its wreck. The citation by the Fifth Circuit of *Petition of Anthony O'Boyle, Inc.*, 161 F.2d 966 (2d Cir. 1947), *aff'd* 71 F. Supp. 72 (S.D.N.Y. 1946), is based upon a clear misreading of the *O'Boyle* case. The Fifth Circuit in a footnote, 727 F.2d at 463 n. 8, stated that the court in *O'Boyle* had held "the grossly negligent sinker liable for subsequent damages sustained by a barge which collided with the wreck." A thorough reading of both the trial and appellate decisions in the *O'Boyle* case reflects that there was no discussion whatsoever of whether the party held liable had been negligent in sinking the wreck, which was one of the barges in its tow. It was found grossly negligent for subsequently striking the sunken barge with another barge in its tow while it was remaking its tow after the first sinking.

Likewise, there appears to be no valid basis for the Fifth Circuit's citation of *American Commercial Barge Lines Co. v. Eagle Marine Industries, Inc.*, 1977 A.M.C. 475 (E.D. Mo. 1976), as supporting its reasoning. The factual and legal similarities between that case and the present one are exceedingly remarkable. In holding that the non-owner of a barge which had caused it to sink was not liable for damages resulting from a subsequent collision of another vessel with the wreck, the court stated in part as follows:

> Turning back to the Court's initial conclusion that Vollmar is not liable, the Court now notes that 33 U.S. Code, sec. 409 is a "drastic statute" which imposes a "very high degree of care * * * upon the owners of wrecks." *Morania Barge No. 140, Inc., supra,*

> 1963 AMC at 680, 312 F.2d at 80. Under this Court's assumption, Vollmar is the original tortfeasor. However, it is this Court's opinion that the breach of duty on the part of both Cargill and Eagle served to supersede Vollmar's negligence. Although Vollmar created the obstruction to navigation in the first instance, both Cargill and Eagle failed to correct the same by the subsequent breach of their respective duties and they thereby perpetuated the existence of that dangerous condition. If either Cargill or Eagle had complied with its respective duty, the sunken barge would have been marked and the risk of collision would have been significantly reduced. [1977 A.M.C. at 485.]

The court then went on to quote the second paragraph of the language from the *Red Star Towing* case quoted *supra* at pages 6-7, emphasizing the last sentence of that paragraph which states as follows:

> ". . . *Though the tug be a guilty party to the original mishap, the duty is not ordinarily upon her to provide against further loss; the statute imposes the duty upon the owner alone, and absolves the tug from subsequent consequences, which conceivably might otherwise be thought to be the proximate result of her original fault.*" (Emphasis added.) [1977 A.M.C. at 485-486.]

On June 8, 1983, the day after oral argument before the Fifth Circuit en banc in this case, the Sixth Circuit decided the case of *Inland Tugs Company v. Ohio River Company*, 709 F.2d 1065 (6th Cir. 1983), in which it clearly dispelled

any possible contention that its decision in *Ingram v. Ohio River, supra,* supported the Fifth Circuit's decision in this case. In the *Inland Tugs* case, the Sixth Circuit stated as follows:

> Admiralty has firmly embraced the doctrine that "there is no divided responsibility" to mark a privately owned, non-abandoned wreck, and "if the statute is to be effectual, there cannot be". *The Anna M. Fahy*, 153 F. 866, 868 (2d Cir. 1907). *See also: The R. J. Moran*, 299 F. 500, 503 (2d Cir. 1924); *Red Star Towing & Transportation Co. v. Woodburn*, 18 F.2d 77, 79 (2d Cir. 1927). Rather "the duty to properly mark under the Wreck Act is non-delegable." *Ingram Corp. v. Ohio River Company*, 505 F.2d 1364, 1371 (6th Cir. 1974). In particular, the federal forum has consistently resisted vessel owners' efforts to impute legal responsibility to mark upon a tortfeasor causing the vessel to sink. *The Anna M. Fahy, supra; The R. J. Moran, supra; Red Star Towing & Transportation Co., supra; Lowery v. The Ellen S. Bouchard,* 128 F. Supp. 16 (N.D.N.Y. 1955), *aff'd* 229 F.2d 436 (2d Cir. 1956); *Nunley v. M/V DAUNTLESS COLOCOTRONIS*, 513 F. Supp. 720 (E.D. La. 1981), *rev., Nunley v. M/V DAUNTLESS COLOCOTRONIS,* 696 F.2d 1141 (5th Cir. 1983), *circuit decision vacated*, 696 F.2d at 1149 (5th Cir. 1983) (en banc review pending). [709 F.2d at 1069]

The fact that the Fifth Circuit's opinion is in direct contradiction to the prior jurisprudence is perhaps most clearly stated by Judge John R. Brown in his opinion in *Continental Oil Company v. Bonanza Corporation*, 706 F.2d 1365 (5th Cir. 1983) (en banc) (separate opinion) wherein he stated as follows:

> Next is *Nunley v. M/V DAUNTLESS*, 696 F.2d 1141 (5th Cir. 1981) now pending en banc. (Cited in n. 13 Op. p. 1374) This Court rejected case law from the Second Circuit on liability of a negligent tort feasor for damage resulting from collision with a sunken wreck not marked by the owner or the United States. [706 F.2d at 1383]

Judge Brown's reference was, of course, to the panel opinion and not the en banc opinion, which, however, decided the question in the same manner as the panel opinion.

The Fifth Circuit expresses in its opinion a concern for the inequity of requiring a non-negligent party to pay for the consequences of another's negligence, citing the case of *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967). The present case, however, clearly does not involve the issues and equities that were present in *Wyandotte*. Specifically, the upriver defendants do not seek to avoid their responsibility for the cost of marking or removing the wreck, a responsibility they clearly have under *Wyandotte*. They do, however, seek to avoid being held responsible for the negligence of Combi and/or the United States in failing to exercise *their* duty to mark and/or remove the wreck. The claims of Combi and the United States for indemnity and contribution, of course, cannot arise unless they are found negligent as they would have no need for contribution or indemnity if they were determined not to be negligent

and thus not liable to the DAUNTLESS interests. With specific reference to indemnity, the Fifth Circuit acknowledged that it could not perceive how Combi could be entitled to indemnity, citing *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 502 (5th Cir. 1982), but nevertheless declined to express an opinion on this indemnity claim, incorrectly stating that it had not been briefed.[4] 727 F.2d at 463. Additionally, although the Fifth Circuit stated that perhaps the United States might be entitled to indemnity, the United States, in its original brief, conceded that it is not entitled to indemnity. Despite the repeated expressions by the Fifth Circuit of its concern for the inability of the owners of the DAUNTLESS to recover from the upriver defendants if Combi and the United States were found not to be negligent, it must be remembered that those concerns are not shared by the owners of the DAUNTLESS. They dismissed their claim against the upriver defendants, and they did not appeal the judgment of the district court granting the upriver defendants' motion to dismiss all claims against them for damage to the DAUNTLESS and holding that the only cause of a collision with a wreck by another vessel is the failure of those responsible to mark and/or remove the wreck.

There is obvious wisdom in the rule stated in *Red Star Towing* which places the sole liability for subsequent collisions with the wreck on the owner, who has the duty under the Wreck Act to mark or remove the wreck. As

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4. The issue was briefed at some length by Dravo Mechling in its original brief and by the upriver defendants in their supplemental brief on rehearing en banc. In addition, pursuant to a telephone conversation with the Clerk of the Fifth Circuit, who advised that a letter would be forwarded to the members of the Court, counsel for Dravo Mechling wrote the Clerk on May 20, 1983, specifically referring the Court to the *Loose* decision, with copies to all counsel of record.

pointed out by the Fifth Circuit in *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 450 (5th Cir. 1977), *cert. denied*, 439 U.S. 800 (1978), negligent non-owners "could not have known in advance of litigation that they would be held responsible for removing the wreck." The present factual situation is an excellent example of why Congress wisely chose to place the burden of marking and removing upon an immediately identifiable party. The Combi barge sank in January of 1974. When she was removed from the river late in 1977, after the DAUNTLESS incident of July 22, 1977, it still was not determined, and in fact has not yet been determined, who, if anyone, was negligent in causing her to sink in the first place. A particularly interesting sidelight to this case is that present counsel for Combi represented not only Combi but also petitioner Dravo Mechling in this consolidated litigation for almost three years after the January 1974 breakaway before evidence was discovered that caused him to conclude that there was a conflict between Combi and Dravo Mechling. The significance of this is that Combi obviously did not believe for almost three years that Dravo Mechling had any responsibility with respect to its sunken barge. It would have been a paradox indeed if the DAUNTLESS had struck the Combi barge while Combi and Dravo were still represented in this litigation by the same counsel.

The Fifth Circuit further stated in both the panel opinion, 696 F.2d at 1144, and in the en banc opinion, 727 F.2d at 465, that the rule sought by the upriver defendants "may indeed be supportable by sound reasons of public policy with regard to allocating risks of harm in maritime commerce." Nevertheless, the Fifth Circuit chose to disrupt the uniform maritime law which then existed as established by admiralty courts for over seventy-five years and to establish instead a contrary rule within the Fifth Circuit. This Court

has long acknowledged the special need for uniformity in admiralty law, *Moragne v. States Marine Lines*, 398 U.S. 375, 401-02 (1970); *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558, 575 (1874). Although the issue of uniform maritime law more frequently occurs in the context of federal supremacy over state law, the need for uniformity is just as great between the circuits as it is between the states.

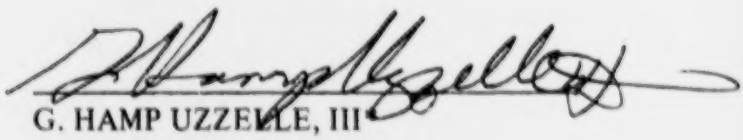
CONCLUSION

The issue presented by this petition is clearly one that is worthy of consideration by this Court. The Fifth Circuit's opinion has unequivocally disrupted the clear and understandable precedent previously established as to who is responsible for insuring that wrecks in the navigable waters are properly marked and/or removed. The fact situation involved in this case is one that will certainly occur again, not only in the circuits which already have conflicting rules but also in the other circuits in which no rule is yet established. The reestablishment by this Court of a clear and unquestionable imposition of responsibility upon the owner, without the necessity of determining who was at fault in the sinking, will effectuate the obvious, wise intention of Congress in enacting the Wreck Act and will greatly enhance navigational safety. This purpose and intention has been recognized by the admiralty courts of this country for over seventy-five years since the establishment of the Act and has worked satisfactorily. If the Fifth Circuit's opinion is allowed to stand, owners of sunken vessels in that circuit will now seek to avoid their responsibility by contending that someone else should do it, and vessels and their crews will be exposed to the dangers of unmarked wrecks while the courts decide who was at fault. Owners of wrecks in circuits which have not yet ruled will not know what to do.

The rule initially established by the Second Circuit clearly places the obligation upon the vessel owner as prescribed by the Wreck Act and at the same time gives that owner virtual *carte blanche* to expend whatever funds are necessary to carry out its responsibility with the realization that, if it could later prove that some other party had been responsible for sinking, it could recover those expenses.[5] This is clearly the superior rule and should be adopted by this Court to be applied nationwide.

Accordingly, petitioners respectfully urge the Court to grant this petition and to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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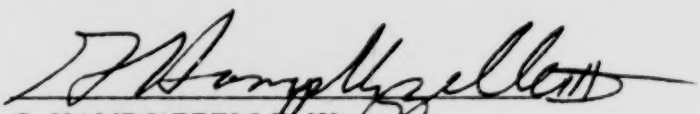
PETITIONERS

5. *Tennessee Valley Sand and Gravel Co. v. M/V DELTA*, 598 F.2d 930 (5th Cir. 1979).

PROOF OF SERVICE

I, G. Hamp Uzzelle, III, counsel of record for petitioners herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of June, 1984, to my personal knowledge, three copies of the foregoing petition for certiorari were served on all parties by depositing same in a United States post office with first class postage prepaid, addressed to Solicitor General, Department of Justice, Washington, D. C. 20530, as counsel of record for the United States, and to Fred E. Salley, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, 28th Floor, New Orleans, Louisiana 70112, as counsel of record for Combi Lines, these two parties being all of the parties required to be served by petitioners.



G. HAMP UZZELLE, III
Counsel of Record for Petitioners

APPENDIX A

Walter Douglas NUNLEY,

Plaintiff,

v.

M/V DAUNTLESS COLOCOTRONIS, et al.,

Defendants,

UNITED STATES of America and Combi Lines,

Defendants-Appellants,

v.

POINT LANDING, INC., et al.,

Defendants-Appellees.

No. 81-3366.

United States Court of Appeals, Fifth Circuit.

March 19, 1984

Owners of vessel damaged as result of collision with unmarked sunken barge brought action against barge's owners, United States, and alleged upriver tort-feasors, whose negligence had resulted in sinking of barge three years previously. Upriver tort-feasors were subsequently dismissed from suit. By appropriate pleadings, barge owner and United States asserted demands that upriver tort-feasors indemnify or contribute to them for any damages recovered against them by damaged ship owners for their failure to mark or remove barge. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, Jr., 513 F.Supp.

720, entered order granting upriver tort-feasors motion for judgment on pleadings. Appeal was taken. The Court of Appeals, 696 F.2d 1141 vacated and remanded. On rehearing, the Court of Appeals, E. Grady Jolly, Circuit Judge, held that initial upriver tort-feasors were not relieved as matter of law of liability for damage resulting from subsequent collision because of failure of sunken barge's owner or of United States to perform any duties of marking or removing sunken vessel.

Reversed and remanded.

Jerre S. Williams Circuit Judge, filed dissenting opinion in which Gee, Circuit Judge, joined.

1. Navigable Waters key 24

Scope and prohibition of Wreck Act against sinking or permitting to be sunk vessels or other crafts in navigable waters apply to both owners and nonowners of vessels. Rivers and Harbors Appropriation Act of 1899, §15, 33 U.S.C.A. §409

2. Navigable Waters key 24

Wreck Act is not liability without fault statute, rather, it first imposes liability on person whose fault causes wreck, and next requires owner of sunken vessel, regardless of fault or lack thereof in causing sinking, to immediately mark wreck. Rivers and Harbors Appropriation Act of 1899, §15, 33 U.S.C.A. §409.

3. Navigable Waters key 24

Vessel owner whose craft is sunk through no fault of his own is still under statutory duty to remove wreck, but he has

option of either raising vessel himself and recovering cost of removal from party responsible for sinking or of abandoning vessel to United States which then bears burden of responsibility for deciding upon removal; if United States does remove, it may recover removal costs from negligent party and nonnegligent owner who abandons vessel to United States is liable neither for cost of removal nor for any damages suffered by third parties as result of wreck. Rivers and Harbors Appropriation Act of 1899, §§ 15, 16, 19, 20, 33 U.S.C.A. §§409, 411, 412, 414, 415.

4. Navigable Waters key 24

Failure of owner, and in some circumstances United States, to mark or remove sunken vessel does not render either liable to injured parties absent breach of their respective duties; injured party may look solely to owner, or alternatively, government, in first instance, but if both government and owner have satisfied their duties, party who negligently caused wreck is liable to injured party.

5. Navigable Waters key 24

Initial upriver tort-feasors, whose negligence allegedly resulted in sinking of barge three years previously, were not relieved as matter of law of liability for damage resulting from subsequent collision between unmarked sunken barge and another vessel because of failure of barge's owner or of United States to perform any duties of marking or removing sunken vessel. Rivers and Harbors Appropriation Act of 1899, §§ 15, 16, 19, 20, 33 U.S.C.A. §§409, 411, 412, 414, 415.

Debra J. Kossow, Torts Branch, Civ. Div., U.S. Dept. of Justice, Washington, D. C., for U.S.

Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Fred E. Salley, Estelle E. Mahoney, New Orleans, La., for Combi Lines.

G. Hamp Uzzelle, III, Alex Lankford, III, Mobile, Ala., for Dravo Melching Inc.

Reuter & Reuter, Normand F. Pizza, New Orleans, La., for Zito Fleeting, Inc.

J. Walter Ward, Jr., New Orleans, La., for Zito Fleeting, Zito Towing and Highlands Ins. Co.

John B. Gooch, Jr., New Orleans, La., for Point Landing.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, and BROWN, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges*

E. GRADY JOLLY, Circuit Judge:

This appeal comes to us from a judgment on the pleadings in favor of appellees who were defendants and third-party

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***Judge Garza, now a senior judge of this circuit, is participating as a member of the panel initially deciding the appeal now subject to en banc review. Judge Davis was not a member of the court when this case was submitted to the court en banc and did not participate in the consideration of this decision.**

defendants in six consolidated admiralty cases intertwined in a 1977 collision of the M/V DAUNTLESS COLOCOTRONIS (DAUNTLESS) with a sunken wreck. The appellees are alleged to have caused the sinking three years before the DAUNTLESS collided with the wreck, unmarked by its owner or the United States, each of whom is alleged to have been responsible for marking or removing the wreck under the Wreck Act.[1] The ruling appealed from is the district court's holding that "the Wreck Act makes the only proximate cause of a collision between a wreck and another vessel, the failure to mark and/or remove the wreck." *Nunley v. M/V Dauntless Colocotronis*, 513 F.Supp. 720, 726 (E.D.La. 1981). A divided panel of this court vacated the judgment and remanded. 696 F.2d 1141 (5th Cir. 1983). Finding that the district court has made an erroneous interpretation of law, the court en banc vacates the district court's judgment and remands.

I.

The facts underlying this litigation are adequately set forth in the district court's opinion. *See Nunley*, 513 F.Supp. at 721–22. Assuming that the allegations of the complaint can be proved, as the motion for judgment on the pleadings requires, a Combi Lines barge (the COMBI) was sunk in 1974, through the negligence of the appellees (the upriver defendants).[2] Three years later, the unmarked wreck was

1. Sections 15, 16, 19 & 20 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§409, 411, 412, 414 & 415) are collectively known as the Wreck Act. For the portions pertinent to this opinion, *see infra* pp. 459, 460 & notes 3 & 4.

2. The upriver defendants in this case are Point Landing, Inc., Zito Fleeting, Inc., Federal Barge Lines, Inc., Lykes Brothers Steamship Co., Midland Enterprises, Inc., Dravo Mechling, Inc., Admiral River Towing Co., and their respective insurance companies.

struck by the DAUNTLESS. The owners of the COMBI allege in turn that they were not negligent in failing to mark the wreck. Multiplicitous litigation followed each event. The litigation arising from the original 1974 sinking was settled in October 1979 without any finding or admission of guilt on the part of any of the parties.

The 1977 collision spawned the six consolidated cases which were before the district court. The parties to the consolidated actions included the DAUNTLESS's captain, Nunley; Tenneco, the owner of the DAUNTLESS's cargo; the DAUNTLESS's owners; the United States; the COMBI's owners; and the alleged sinkers of the COMBI, the upriver defendants. The upriver defendants filed a motion for judgment on the pleadings, claiming that, even if they had caused the original sinking of the COMBI, under no set of facts could they be liable to any of the claimants, cross-claimants, or third-party claimants for damages resulting from the collision of the DAUNTLESS with the sunken wreck. The basis for this argument is that the Wreck Act obligates the owner of a sunken vessel and, in some circumstances the United States, to mark or remove the wreck, and since the upriver defendants (the actual sinkers of the vessel) have no similar obligation, they have no liability arising out of the DAUNTLESS's allegedly striking the COMBI. While the owners of the COMBI plead that they were not negligent, and therefore are not liable, they tender to the DAUNTLESS as defendants under Fed.R.Civ.P. 14(c) the upriver defendants. They also assert that, if they are found at fault and hence liable to the DAUNTLESS, they are entitled to indemnity or contribution from the upriver defendants.

Section 15 of the Rivers and Harbors Act, also known as the Wreck Act, provides in pertinent part:

> It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels . . . . And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

33 U.S.C. §409. The district court found that the Wreck Act made the failure to mark or remove the wreck the sole proximate cause of a subsequent collision with the sunken vessel as a matter of law and dismissed the claims against the upriver defendants. It is this holding which we consider en banc. If this is correct, then judgment was properly rendered in favor of the upriver defendants. If not, then we must consider the effect of the COMBI's alternative pleadings, that either (a) it was entirely free of fault and it tenders the upriver defendants to the DAUNTLESS, or (b) it may have been legally at fault as to the DAUNTLESS but entitled to indemnity from the upriver defendants; or (c) it may have been jointly at fault with the upriver defendants and entitled

to contribution. We reverse the dismissal because: (1) if either the COMBI or the United States or both were entirely free of fault in failing to mark, the upriver defendants may be liable to the DAUNTLESS directly; (2) though the DAUNTLESS is entitled to recover from the COMBI or the United States if either was negligent, the party liable to the DAUNTLESS may be entitled to contribution from the upriver defendants.

II.

A.

[1] The Wreck Act declares that it is illegal voluntarily or carelessly "to sink, or permit or cause to be sunk vessels or other craft in navigable channels. . . ." 33 U.S.C.§409. The statute's prohibition and scope apply to both owners and non-owners of vessels who intentionally or negligently cause them to sink. *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 444 (5th Cir.), *cert. denied*, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1977). The statute further requires the owner of a sunken wreck, whether at fault or not in causing the sinking, immediately to mark the wreck and subsequently to commence the removal of the wreck, failure of which shall constitute an abandonment of the vessel, which shall then be subject to removal by the United States. However, the United States Supreme Court has held that the enactment was not intended to make the statutory remedies exclusive and that under principles of tort liability the negligent non-owner is subject to liabilities and obligations not provided for by the statute, such as reimbursement for the costs of removing the wreck or the obligation, through injunctive relief, to remove the sunken vessel. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 200–05, 88 S.Ct. 379, 385–87, 19 L.Ed.2d 407 (1967).

This circuit has previously delineated the obligations and duties of the various parties to a sinking under the Wreck Act. We summarize those obligations and duties here.

[2] The Wreck Act is not a liability without fault statute. It first imposes liability on a person whose fault causes a wreck. It next requires the owner of a sunken vessel, regardless of his fault or lack thereof in causing the sinking, immediately to mark the wreck. 33 U.S.C. §409[3] *In re Marine Leasing Services, Inc.*, 471 F.2d 255, 257 (5th Cir. 1973).

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3. The regulations enforcing this section are found at 33 C.F.R. §64.01 and provide in pertinent part:

> §64.01—1 General.
>
> (a) The owner of a vessel sunk in the navigable waters of the United States who fails to mark the wreck immediately for the protection of navigation with a buoy or daymark during the day and a light at night may, in addition to being in violation of 33 U.S.C. 409, be liable for resulting damages to the public. . . .
>
> (b) The Coast Guard is authorized to mark for the protection of navigation any sunken vessel or other obstruction that is not suitably marked. Marking by the Coast Guard does not relieve the owner of any such obstruction from the duty and responsibility suitably to mark the obstruction and remove it as required by law.
>
> §64.01—5 Marking by owners.
>
> Buoys, daymarks, and lights established by owners of sunken vessels or other obstructions to mark such obstructions for the protection of navigation shall conform to the lateral system of buoyage prescribed by Subpart 62.25 of this chapter. Such markings shall be maintained until the obstruction is removed or the right of the owner to abandon is legally established and has been exercised.
>
> §64.01—10 Marking by the U.S. Coast Guard.
>
> (a) When the District Commander within whose

Thus, when a danger to navigation is established in the form of a sunken vessel, the statute places a duty on an easily determinable figure, the owner of the wreck, to ensure that the danger of the obstruction is immediately lessened by its marking or removal. In this way, the wreck may be marked and removed quickly, thus reducing the chance that it will cause injury to others. We have judged performance of this duty in terms of negligence. For the duty to arise in the first instance, the owner must be notified of the sinking and be given a reasonable time in which to accomplish the marking. *Berwind-White Coal Mining Co. v. Pitney*, 187 F.2d 665, 668 (2d Cir. 1951); *Red Star Towing & Transportation Co. v. Woodburn*, 18 F.2d 77, 78 (2d Cir. 1927). Moreover, if the United States itself lights and marks the wreck, this relieves the owner's duty to mark. *Humble Oil & Refining Co. v. Tug Crochet*, 422 F.2d 602, 609 (5th Cir. 1970). Finally, we have held that, if an owner diligently and in good

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3. Continued

jurisdiction a sunken vessel is located determines that the wreck is not suitably marked by the owner for the protection of navigation, he may mark the wreck in such manner and for so long as in his judgment the needs of maritime navigation require. The costs of such marking by the Coast Guard will be charged to the owner of the wreck.

(b) When the District Commander within whose jurisdiction a sunken obstruction other than a vessel is located determines that the obstruction is not suitably marked for the protection of navigation, he may mark the obstruction in such manner and for so long as, in his judgment, the needs of maritime navigation require. The costs of such marking will be charged to the owner of the obstruction. When the needs of navigation permit, the owner will be informed that the obstruction should be marked and will be afforded reasonable opportunity to mark the obstruction.

faith searches for his sunken vessel but cannot find it, he has fulfilled his obligations to mark under the Wreck Act. *Allied Chemical Corp. v. Hess Tankship Co.*, 661 F.2d 1044, 1061 (5th Cir. 1981). Nevertheless, in keeping with the general principles of maritime tort that an innocent party should not be made to suffer while the party at fault escapes liability, *Wyandotte, supra*, 389 U.S. at 204, 88 S. Ct. at 387, the jurisprudence permits the party that incurs the marking and removal expenses to recover these from the party whose negligence caused the sinking.

A vessel owner who negligently causes the sinking of his vessel may not thereafter abandon his vessel to the United States. If he subsequently fails to remove the sunken wreck, the negligent owner is liable for the cost of removal and for all subsequent damages resulting from the vessel's continued interference with navigation. *Humble Oil & Refining Co.*, 422 F.2d at 608; *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 934 (5th Cir. 1979). As with the duty to mark, however, when the negligent owner has diligently and in good faith searched for his sunken vessel but cannot find it, our case law has refused to find that failure to remove constitutes a breach of the Wreck Act duty. *Allied Chemical Corp.*, 661 F.2d at 1061.

[3] A vessel owner whose craft is sunk through no fault of his own is still under a statutory duty to remove the wreck, *Tennessee Valley*, 598 F.2d at 934, but he has the option of either raising the vessel himself and recovering the cost of removal from the party responsible for the sinking, *or* of abandoning the vessel to the United States, which then bears the responsibility for deciding upon removal; if the United States does remove, it may recover removal costs from the negligent party. *Tennessee Valley*, 598 F.2d at 934. If the non-negligent owner chooses the second option and abandons the vessel to the United States,

he is liable neither for the cost of removal nor for any damages suffered by third parties as a result of the wreck. *Id.*

Thus, this circuit, while not diminishing in any way the stringent duty which the Wreck Act imposes, has viewed the owner's duty and response thereto in terms of negligence. If the owner diligently and in good faith endeavors to carry out that duty, this circuit has refused to find that he has breached a statutory duty. A party injured by the owner's failure to mark need look only to the owner for recovery. The owner may, however, absolve himself by showing that the failure to mark was not due to any fault whatever on his part. It is not freedom from negligence in causing the sinking that relieves the owner but only the scrupulous observance of his duty without fault to mark the vessel.

B.

The non-negligent owner of a sunken vessel may choose to abandon his craft to the United States under the Wreck Act. *See Tennessee Valley*, 598 F.2d at 934. When he does so, the wreck becomes subject to removal by the government. 33 U.S.C. §409. In determining the government's duty at that point, we have scrutinized other sections of the Wreck Act and 14 U.S.C. §86.

Section 409 authorizes the Secretary of the Army, in his discretion, to remove a sunken vessel when the owner has failed to do so. *Buffalo Bayou Transportation Co. v. United States*, 375 F.2d 675, 677 (5th Cir. 1967). Section 414[4]

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4. 33 U.S.C. §414 provides in pertinent part:

> Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other

likewise authorizes the Secretary at his discretion, to break up, remove, sell or otherwise dispose of an abandoned wreck that is obstructing the navigation of a navigable river. 33 U.S. C. §414. Furthermore, to protect navigation, 14 U.S.C. §86[5] authorizes the Secretary of Transportation to mark any sunken vessel or other obstruction existing on the navigable waters "in such manner and for so long as, in his judgment, the needs of maritime navigation require."

We have previously held that the government has no mandatory duty to remove "each sunken vessel" in navigable waters. *Buffalo Bayou Transportation*, 375 F.2d at 677. The statutory discretion granted to the government in determining whether to mark or remove a sunken wreck,

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4. Continued

similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability of any damage to the owners of the same. . . .

5. 14 U.S.C. §86 provides in pertinent part:

The Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters or waters above the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require. The owner of such an obstruction shall be liable to the United States for the cost of such marking until such time as the obstruction is removed or its abandonment legally established or until such earlier time as the Secretary may determine. . . . This section shall not be construed so as to relieve the owner of any such obstruction from the duty and responsibility suitable to mark the same and remove it as required by law.

however, requires that the Secretary utilize due care if he undertakes to mark or remove, and, perhaps, in making the decision whether or not to act. *Canadian Pacific (Bermuda) Ltd. v. United States*, 534 F.2d 1165, 1168 (5th Cir. 1976).[6] The United States is also liable if it assumes a duty by its own regulation and negligently fails to perform that duty. *Transorient Navigators Co., S.A. v. M/S Southwind*, 714 F.2d 1358 (5th Cir. 1983). *Canadian Pacific* does not explicitly determine the scope of the government's duty, and, for purposes of determining the issue before us, we need not do so, in view of the allegations of the pleadings. In statutory context, the Wreck Act provisions merely authorize the United States to proceed either to mark or to remove the sunken vessel when the owner fails to do so, but they do not impose a mandatory duty on the government to remove the wreck, and, therefore, the United States is not liable to a third party for its failure to do so. *Buffalo Bayou Transportation Company v. United States*, 375 F.2d 675, 677 (5th Cir. 1967). Indeed, until now, we have described the effect of the non-negligent owner's abandonment upon the United States only in terms of its granting the government the discretionary right to remove the vessel and recover the resulting costs thereof from the negligent tortfeasor:

> The owner of a vessel sunk without any negligence on his part is still subject to the statutory obligation to remove the wreck, but is given an option: he may either raise the vessel himself and seek recovery of the expenses from the party responsible for the sinking, or he may abandon the vessel and allow the

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6. The Suits in Admiralty Act, 46 U.S.C. §742, under which the United States may be sued in admiralty, disavows governmental immunity in such suits.

> United States to bear the burden of removel and recovery of expenses from the negligent party.

Tennessee Valley, 598 F.2d at 934 (citations omitted).

II.

The statutory language is completely absent of any indication that either the failure of the owner to mark the wreck or, in the event of his failure to do so, the expressly discretionary power of the United States to mark or remove it, was intended to relieve a negligent tortfeasor of its liability for negligence causing damages to others. In holding that the negligent non-owner may be held liable for the costs of removing the wreck under ordinary tort principles, *Wyandotte, supra,* the Supreme Court has said that the Wreck Act's statutory language and legislative history is devoid of intent that, by the Act, "a party who negligently sinks a vessel should be shielded from personal responsibility." 389 U.S. at 200, 88 S.Ct. at 385.

We here review a judgment on the pleadings, which insofar as affirmed must be based upon the premise that under no set of circumstances could the owner have a claim against the upriver defendants directly, even if the owner and the United States were found free of fault; that, if the owner is found at fault, in no set of circumstances could it be found entitled to contribution from the upriver defendants; and that, if the United States is found at fault under no set of circumstances would it have a right to indemnity or contribution from the upriver defendant tortfeasors. The jurisprudence has recognized that, in exceptional circumstances, the United States may be held liable to third persons damaged by subsequent collision with an unmarked wreck. Most

readily familiar is the circumstance when the United States has affirmatively undertaken to mark the wreck but thereafter negligently fails to do so (a premise of the cause of action here asserted against the United States). *Indian Towing Company v. United States*, 350 U.S. 61, 69, 76 S.Ct. 122, 126–27, 100 L.Ed. 48 (1955); *Greer v. United States*, 505 F.2d 90, 92 (5th Cir. 1974). *See*, to similar general effect, *Canadian Pacific (Bermuda) Limited v. United States*, 534 F.2d 1165, 1169 (5th Cir. 1976) (rejecting a claim against United States for its negligence in maintenance of a waterway, *for the maintenance of which it was legally responsible*, because the United States had no prior knowledge of the existence of a shoal that caused an accident). As we have already noted, we do not undertake to determine whether the government is liable for negligently failing to mark a wreck, or is liable only if it undertakes to mark and does so negligently, because the facts are not yet developed.

III.

Should either the owner or the United States be held liable, however, their negligence cannot be regarded, per se, as a superseding cause exonerating the negligent tortfeasors from any liability whatsoever for damages primarily resulting from their negligence, and under ordinary admiralty tort principles the causal initial negligence of the upriver defendants that contributed to the later accident should make them liable for their apportioned share of the loss. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 1715–16, 44 L.Ed.2d 251 (1975).

A.

The district court interpreted a long line of Second Circuit

cases[7] as holding that the only proximate cause of a collision between a wreck and another vessel was the failure to mark. *Nunley*, 513 F.Supp. at 724. The basis for this ruling was Judge Learned Hand's opinion in *Red Star Towing & Transportation Co. v. Woodburn*, 18 F.2d 77 (2d Cir. 1927). We do not read *Red Star Towing* quite so broadly. Rather than discussing the *sole* proximate cause of a subsequent collision with the wreck, the Second Circuit held, in effect, that the owner's failure to mark was a superseding intervening cause which eliminated any liability on the part of the original tort-feasor, the party responsible for sinking the vessel. *See Red Star Towing*, 18 F.2d at 79. The court further discussed the potential fault of a vessel which collided with the wreck *after* being advised of the wreck's location. *Id.* Such a discussion would have been unnecessary if the *sole* proximate cause of the subsequent collision rested on the owner's failure to mark or remove the wreck.

B.

To further its purpose of preventing obstructions in the nation's waterways, *see Wyandotte*, 389 U.S. at 201, 88 S.Ct. at 385, the Wreck Act places a duty on easily identifiable parties: the owner of a sunken vessel immediately to mark the wreck, and the United States in some cases to mark or remove the wreck. That duty establishes a standard of care applicable in ordinary maritime negligence actions. *The Bohemian Club*, 320 U.S. 462, 464 n. 1, 64 S.Ct. 225, 226 n. 1, 88 L.Ed. 168(1943). This policy of squarely placing both the responsibility and the subsequent liability

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7. The cases on which the district court relied are: *The Anna M. Fahy*, 153 F. 866 (2d Cir. 1907); *The R. J. Moran*, 299 F. 500 (2d Cir. 1924); *Red Star Towing & Transportation Co. v. Woodburn*, 18 F.2d 77 (2d Cir. 1927); *Lowery v. The Tug Ellen S. Bouchard*, 128 F.Supp. 16 (N.D.N.Y. 1955), *aff'd* on opinion of trial court, 229 F.2d 436 (2d Cir. 1956).

for negligent breach of that responsibility on the owner, or in some cases the United States, serves to ensure enforcement of the Wreck Act.

[4] To the extent that the Second Circuit holds the owner liable, whether negligent or not in failing to mark, we disagree.[8] Since the time that decision was reached the rules governing allocation of responsibility for collision have been altered dramatically, by the institution of the principle of comparative fault, replacing the doctrine of major-minor fault. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975). Because all of the duties imposed by the Wreck Act, whether on the party who causes the sinking, the owner, or the United States, are based on negligence, the failure of the owner, and in some circumstances the United States, to mark or remove a sunken vessel does not render either liable to the injured parties absent a breach of their respective duties as we have previously outlined them. Such a determination must take into consideration all of the relevant circumstances and is a finding of fact to be made by the district court in the first instance.

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8. The cases relied upon by the district court all dealt with owners who were negligent in failing to mark the sunken vessels. This negligence was discussed at lenth, and it could well be that had the owners not had notice of the sinking and a reasonable time in which to mark, the holdings would have been different. *See e. g., Red Star Towing & Transportation Co.*, 18 F.2d at 78–79; *The Tug Ellen S. Bouchard*, 128 F.Supp. at 24–25.

Moreover, in *Petition of Anthony O'Boyle*, 161 F.2d 966, 967 (2d Cir. 1947), the Second Circuit found that although the owner had failed to mark a sunken vessel, such failure to mark did not constitute negligence. The court further held the grossly negligent sinker liable for subsequent damages sustained by a barge which collided with the wreck.

The injured party may look solely to the owner, or, alternatively, the government, in the first instance. But neither may be held liable without a finding not only that a sunken vessel has not been marked, but also a finding that the failure to mark was the result of the negligence of the wreck owner, or in some circumstances, of the United States.

A corollary to our concern for enforcement of the Wreck Act is the inequity of requiring a non-negligent party to pay for the consequences of another's negligence. As the Supreme Court stated in *Wyandotte*, although in another context, there is no indication in the legislative history of the Wreck Act, in its predecessor statutes, or in non-statutory law that "Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility." *Wyandotte*, 389 U.S. at 200, 88 S.Ct. at 385. It further stated:

> The Government may . . . seek an order that a negligent party is responsible for rectifying the wrong done to maritime commerce by a §15 violation. Denial of such a remedy . . . would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim. It might in some cases permit the negligent party to benefit from the commission of a criminal act.

Wyandotte, 389 U.S. at 204, 88 S.Ct. at 387. If both the government and the owner have satisfied their duties, the party who negligently caused the wreck is liable to the injured party. If either has failed to perform its duty, it is liable to the injured party, but may in turn seek contribution (or, perhaps, in the case of the United States, indemnity)

from the party originally negligent. We do not perceive in what circumstances the owner might be entitled to indemnity. *See Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 502 (5th Cir. 1982) ("the concepts of active and passive negligence have no place in a liability system that considers the facts of each case and apportions damages among joint tortfeasors according to the degree of responsibility of each party"). In view of the fact that this issue has not been briefed, we intimate no opinion concerning it.

C.

The fact that the owner or the United States may later recoup from the party at fault does not demonstrably lessen their incentive promptly to mark the vessel and thus to minimize the possibility that they may be held solely liable or may be found not to have mitigated damages.

IV.

To hold that failure to mark, whether or not negligent, constitutes a superseding cause, completely absolving the party whose fault, however egregious, caused the sinking disregards the normal rules of causation and their role in defining legal liability. The problem is "one of whether the defendant is to be held liable for an injury to which he has in fact made a substantial contribution, when it is brought about by a later cause of independent origin, for which he is not responsible." Prosser, Law of Torts, 4th ed. 270. In essence, the issue is a question of the extent of the original obligation of the party who was first at fault. The problem, properly speaking, is not one of "causation" at all, "since it does not arise until causation is established. It is rather one of the policy as to imposing legal responsibility." *Id.*

Prosser explains when a person should be liable for his acts even though the later act of another contributes to injury.

> If the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, he may be negligent, among other reasons, because he has failed to guard against it; or he may be negligent only for that reason. Thus one who sets a fire may be required to foresee that an ordinary, usual and customary wind arising later will spread it beyond his own property, and therefore to take precautions to prevent that event.

Id. at 272.

A person who negligently sinks a vessel should foresee that the sunken vessel may remain unmarked either because the owner could not locate it despite diligent effort or because the owner negligently failed to locate it or failed even to search for it. In like fashion, it is foreseeable that the owner may abandon the wreck, and the United States may in turn fail to mark it. In such a case, "there is an intervening cause combining with the defendant's conduct to produce the result, and . . . the defendant's negligence consists in failure to protect the plaintiff against that very risk." *Id.* at 273. "The risk created by the defendant may include the intervention of the foreseeable negligence of others. As we have seen above, the standard of reasonable conduct may require the defendant to protect the plaintiff against 'that occasional negligence which is one of the ordinary incidents of human life, and therefore to be anticipated.' " *Id.* at 274.

The Restatement (Second) of Torts sets forth principles for determining whether an intervening force supersedes prior negligence. They are:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Id. §442. Section 447 continues:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner *does not* make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Id. §447.

By these criteria failure to mark does not, per se, "supersede" the liability of the party at original fault. Indeed in *Allied Chemical Corporation v. Hess Tankship Co.*, 661 F.2d 1044 (5th Cir. 1981), this court recently rejected a contention that subsequent negligence would, as a superseding cause, exculpate a non-owner negligent sinker (Great Fortune) from causal responsibility for the subsequent collision with a sunken vessel. We there noted, although by way of dicta (since we affirmed on another ground), that "[a] subsequent negligent act does not excuse prior negligence." *Allied Chemical, supra*, 661 F.2d at 1060.

The upriver defendants argue for a rule that the consequences of their negligence stop with their liability for the damages to the sunken vessel itself and for the costs of marking and removing it. They argue that, since they themselves had no duty to mark the wreck, they should not be liable for damages caused by subsequent collisions with the unmarked wreck. Such a rule may indeed be supportable by sound reasons of public policy with regard to allocating risks of harm in maritime commerce.

The issue before us, however, is whether the Wreck Act imports such a rule—and we find no statutory authority for such a rule, nor that such a rule is either jurisprudentially or logically implicated by the reasons for the owner's liability for his negligent failure to mark or remove. The Wreck Act itself refers only to the duty of an owner to mark a vessel. It does not refer to any liability that subsequently attaches, because of the failure to mark the sunken wreck, whether the liability be that of the owner or of a negligent non-owner who causes the wreck. The Act does not manifest any intent to preempt any remedy against a tortfeasor for damages resulting from an unmarked wreck.

The remedies and procedures specified by the statute have been held by the United States Supreme Court as "not intended to be exclusive," at least not insofar as the United States government is concerned. *Wyandotte, supra,* 389 U.S. at 200–01, 88 S.Ct. at 385. The courts have, in fact, permitted recovery against a tortfeasor by remedies beyond those specified by the statute. These include recovery from the negligent party for the expenses incurred in marking and removing the wreck, *Id.* at 204, 88 S.Ct. at 387, *Tennessee Valley Sand & Gravel Co. v. M/V Delta,* 598 F.2d 930, 934 (5th Cir. 1979), and no reason is shown why, under the statutory language and purposes, the negligent

non-owner should not similarly be held liable for damages resulting from a subsequent collision with a vessel initially sunk through his negligence.

General principles of maritime tort also support liability, for at least apportioned damages resulting from post-sinking collisions with the wreck, on the part of the wrong-doer who negligently caused it. "[N]egligent conduct on the navigable waters that causes loss to another constitutes a maritime tort." *United States v. M/V Big Sam*, 681 F.2d 432, 443 (5th Cir. 1982). Here, where for purposes of the judgment on the pleadings negligence is conceded, the causal initial negligence of the upriver defendants that contributed to the later accident would ordinarily require them to bear their apportioned share of the loss, should the negligence of either the United States or of the COMBI have contributed to the accident. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 1715–16, 44 L.Ed.2d 251 (1975). We do not find either in the statutory language or in the legislative history or purposes of the Wreck Act—which in terms only places *criminal* liability upon those who negligently cause a wreck in the navigable waters, as well as upon a vessel's owner who fails to mark it—any legislative purpose to relieve the tort-feasor who caused the wreck of his *civil* liability for the damages consequent to his negligence. Perhaps the failure of other parties to mark the sunken wreck may in some circumstances be a superseding cause of the subsequent collision, or perhaps the tort-feasor's fault may be minimal compared with the fault of the non-marking parties. These, however, are issues that may not be decided by a judgment on the pleadings alone, as in this case.

This reasoning can also be seen in the case law in other

circuits,[9] including the Second Circuit on which the district court relied. *See Petition of Anthony Boyle*, 161 F.2d 966, 967–68 (2d Cir. 1947) and *supra* note 8.

V.

A.

[5] Having delineated the duties under the Wreck Act and its relationship to a normal maritime negligence action, we turn to the case at bar and the district court's ruling.

A close reading of the pleadings in the six consolidated cases indicates that pending before the court at the time that judgment on the pleadings was granted were the following claims against the upriver defendants: claims of the DAUNTLESS's owners for damages resulting from the striking of the COMBI by the DAUNTLESS,[10] claims of the COMBI owners for indemnity, contribution, apportionment of fault or judgment for the plaintiffs in the consolidated action[11] and claims of the United States for

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9. *See Lane v. United States*, 529 F.2d 175 (4th Cir. 1975); *Ingram Corp. v. Ohio River Co.*, 505 F.2d 1364 (6th Cir. 1974); *American Commercial Barge Line Co. v. Eagle Marine Industries, Inc.*, 1977 A.M.C. 475 (E.D.Mo. 1976).

10. The DAUNTLESS claimants sought to dismiss these claims without prejudice one week after the hearing on the motion for a judgment on the pleadings. The motion to dismiss was granted six weeks after judgment on the pleadings was granted. Even though the DAUNTLESS's claims against the upriver defendants were dismissed without prejudice, and even though judgment had already been granted for the upriver defendants on the pleadings, the upriver defendants did not contest the granting of this motion.

11. In its third-party complaint against the upriver defendants, the COMBI owners, petitioners for limitation of liability or exoneration, sought indemnity, contribution, or apportionment of fault from the

indemnity and contribution in the event judgment was entered against the United States.[12] In addition, there was a tender of the upriver defendants as parties liable to the DAUNTLESS under Rule 14(c).

Thus the question properly before the court was whether under any set of facts postulated the upriver defendants could be held liable to any of the parties for any damages resulting from the striking of the COMBI by the DAUNTLESS.

We first note that the COMBI alleged that it was not negligent in either causing the original sinking of the barge or in failing diligently to search for the sunken vessel in order to mark and remove it.[13] On appeal, however, the upriver defendants, urging affirmance of the judgment on

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11. Continued
upriver defendants in the event that they were held liable in any of the consolidated cases. They likewise sought judgment in favor of the plaintiffs in the consolidated action against the upriver defendants under Fed. R. Civ.P. 14(c). The plaintiffs in the consolidated action when the third-party complaint was filed were the DAUNTLESS's owners and captain, Tenneco, and the United States.

12. The motion for judgment on the pleadings did not seek to dismiss the claims of the United States for the cost of removing the sunken COMBI barge which was accomplished after the DAUNTLESS accident.

13. The upriver defendants likewise claimed that liability for the initial sinking of the COMBI barge had never been established, although that case had been settled, and denied any liability for the initial sinking. The defendants moreover denied that the DAUNTLESS struck the sunken COMBI barge or that the damages to the DAUNTLESS resulted from striking the sunken barge. For purposes of the motion, however, we may assume that the upriver defendants caused the 1974 sinking of the COMBI barge, that the DAUNTLESS did in fact hit the sunken COMBI barge, and that all damages resulted from that striking.

the pleadings, argue that for the issue of indemnity or contribution to arise, the COMBI must be adjudged liable for damages in the first instance. Thus for the claims of indemnity or contribution against the upriver defendants to survive, COMBI must necessarily be assumed to have been negligent. This likewise applied to the claims of the United States for indemnity or contribution. Because the pleadings of both the United States and COMBI deny all wrong doing, there can be no relief to either in the form of indemnity or contribution. Although these points may be well taken, at least as far as they go, this argument ignores COMBI's third-party request for judgment for the plaintiffs under Fed.R. Civ.P. 14(c) as well as the original claims of the DAUNTLESS owners which were pending before the court.

By finding that the sole proximate cause of the subsequent collision with the wreck is the failure to mark, the district court effectively placed strict liability on the owner to fulfill this duty. As we noted in Part II, neither our reading of the Second Circuit cases on which the district court relied nor the jurisprudence of this circuit would support such a holding.

The issues in this case cannot be resolved as a matter of law on the present record. If the district court determines that either the COMBI or the United States, or both, were without fault in failing to mark or remove the wreck, and that the upriver defendants negligently caused the sinking of the COMBI, the upriver defendants may be directly liable to the plaintiffs. If the COMBI or the United States, or both, are determined to be at fault, the district court, applying ordinary principles of tort law, should determine whether their negligence acts as a superseding cause absolving the upriver defendants of liability. If the district court finds that the intervening negligence, if any, of the United States or the COMBI could have been "reasonably anticipated"

by the upriver defendants, it should apportion liability among all the defendants according to their comparative fault. The damages for which the upriver defendants may be held liable are not limited to the cost of marking or removing the wreck, but extend to the damages caused by the collision of the DAUNTLESS with the COMBI.[14]

Accordingly, we REVERSE the district court's holding and REMAND the case for further proceedings consistent with this opinion.

JERRE S. WILLIAMS, Circuit Judge, with whom GEE, Circuit Judge, joins, dissenting:

The opinion for the Court has stated the procedural posture of this case. It has also carefully defined the single issue which is before us. The opinion's assumption, however, of the facts upon which the issue is to be resolved and the legal conclusion to be drawn from those facts is faulty and leads to an incorrect result.

In this opinion I do not undertake to spell out the full legal support for my views. This was done in my dissenting opinion to the panel decision in this case. *Nunley v. M/V DAUNTLESS COLOCOTRONIS*, 696 F.2d 1141, 1147 (5th Cir. 1983).

We properly assume in the decision of this case that the

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14. Although the upriver defendants may ultimately be held liable for damages to the DAUNTLESS, such liability will not automatically flow from the fact that the upriver defendants were negligent in causing the sinking of the COMBI. The DAUNTLESS must, as must all parties in this type of litigation, prove that the negligence was the proximate cause of the accident; the same would be true with respect to the negligence of the COMBI or the United States in failing to perform their duties under the Wreck Act.

upriver defendants, enumerated in note 2 of the opinion for the Court, p. 457, *supra*, were guilty of negligence in causing the original maritime accident in 1974. In that accident, the barge owned by COMBI sank when the barges upriver broke loose and in floating down the Mississippi River hit the COMBI barge, tore it loose from its moorings, and sank it. We also must assume that neither the owner of the barge, COMBI, nor the United States Government were negligent in the original maritime accident leading to the wreck of the COMBI barge.

The opinion for the Court is correct as well in recognizing that the resolution of the issue in dispute is dependent upon the application of the Wreck Act, §§15, 16, 19, and 20 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§409, 411, 412, 414, 415). It is the Court's interpretation of the Act and its application to the maritime events involved in this case which compels this dissent. The opinion for the Court interprets the Act in a way which is contrary to every single case which has litigated the issue which is before this Court.

While the text of the critical statutory provision, §15 of the Act, 33 U.S.C. §409, is not a model of clarity in draftsmanship, it yields the proper interpretation that the responsibility for eliminating the hazard to navigation created by a sunken vessel lies wholly upon the owner of the vessel or the United States Government regardless of whose negligence caused the sinking. Just eight years after the passage of the Wreck Act, the Second Circuit in *THE ANNA M. FAHY*, 153 F.2d 866 (2d Cir. 1907), so interpreted the Act. It placed the full burden to mark and if necessary remove a sunken vessel on the owner of the vessel or on the United States Government. The law as to this issue was then developed in the Second Circuit through a series of decisions

which have never been challenged by a court decision until this case. While it is true that all of the law interpreting the Wreck Act on this issue was developed in the Second Circuit, it remained as accepted law throughout the United States until the *DAUNTLESS COLOCOTRONIS* case which is before us.

The most commonly quoted statement of the rule is found in Judge Learned Hand's decision in *Red Star Towing and Transportation Co. v. Woodburn*, 18 F.2d 77 (2d Cir. 1927). This was a case just as the case *sub judice* in which the issue was whether a tugboat which negligently caused a sinking could still be held liable by the vessel that hit the submerged wreck as opposed to the sole liability flowing from the owner of the submerged wreck or the United States Government. As a remarkable factual strengthening to the ruling of the Court, the tug boat company which caused the negligent sinking is the same one that successfully achieved recovery against the owner when another one of its tugboats ran into the submerged wreck just a few days later. Yet the Court applied the rule of statutory liability on the owner without liability on the perpetrator of the negligent sinking.

In the course of the opinion Judge Learned Hand in referring to the Wreck Act said:

> The statute establishes a new duty arising after the sinking, and demanding as its condition nothing but the fact and notice of it to the wreck owner. Though the tug be a guilty party to the original mishap, the duty is not ordinarily upon her to provide against further loss; the statute imposes the duty upon the owner alone, and absolves the tug from subsequent consequences, which conceivably

> might otherwise be thought to be the proximate result of her original fault.
> *Id.* at 79.

The opinion for the Court is correct in stressing that the negligent upriver defendants were liable for the *costs* of marking and removing. And this is all that *Wyandotte Transportation Co. v. United States,* 383 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), held which is relevant to this case. Obviously this holding follows the statutory scheme and is consistent with the established rule. The fallacy is in going beyond the sinking to make the negligent non-owners responsible for damage to the vessel which later collides with the sunken barge. For this there is no authority in the law. No prior holding exists which supports this view taken by the Court. All of the detailed reasoning of the opinion of the court skirts around this fundamental fact.

This case involves a judgment on the pleadings, but this does not restrict the application of the settled principles of the Wreck Act. We need not speculate what the situation might be if the collision with the submerged vessel took place shortly after the sinking. The pleadings establish that in this case the collision took place more than three years after the sinking. If either the owner or the United States Government had carried out its obligations under the Wreck Act, there would have been no collision of the DAUNTLESS COLOCOTRONIS with the sunken barge. It would have been marked or removed and at the expense of the negligent upriver defendants. But under the Wreck Act the obligation of the upriver defendants does not extend beyond that liability. It does not reach the consequent damage in a later collision with the sunken vessel because of the failure of the owner or the United States Government to carry out its statutory obligations.

The Wreck Act is obscure with respect to the right of the owner to abandon the wreck, thereby forcing the obligation upon the government to take over marking and removing if the sunken vessel is an obstruction to navigation. But the dispute between the owner and the United States Government as to their respective obligations under the statute is not before us. The upriver defendants in pleading their defense did not have to establish whether it was the owner or the United States Government which was liable. All they had to plead was that under the Wreck Act they were not.

The assumption by the opinion of the Court that the liability of the owner or the United States Government under the Wreck Act is based upon negligence is not correct. It is quite clearly not based upon negligence as the statute itself reveals. The opinion of the Court rewrites the statute when it bases its interpretation on negligence and upon the later rationalization based upon the development of comparative negligence.

The Wreck Act creates a statutory obligation, as we held in *Allied Chemical Corp. v. Hess TankShip Co.*, 661 F.2d 1044, 1061 (5th Cir. 1981). Then as a matter of defense, and defense only, the owner (and it can be assumed the United States Government) can come in and prove that the location of the wreck was not known and that an attempt to locate the wreck was diligently pursued. *Ibid.* By way of analysis, it perhaps could be said that establishing this defense requires the proof of non-negligence in the attempt to locate the wreck. In any event, this defense of no statutory liability if the owner or the government cannot find the wreck is a proper gloss added to the Wreck Act by judicial interpretation. But it is far off target to claim it establishes that the obligation to mark or to remove the wreck placed upon the owner or the United States Government is an obligation grounded in negligence. It is strictly

a statutory obligation regardless of negligence.

The opinion of the Court finds no justification for a holding of "strict liability" upon the owner and seems to view strict liability with distaste. One cannot read the Wreck Act without recognition that it calls for strict liability upon the owner to carry out its obligations without regard to its fault. Further, the opinion rests its conclusion in part upon a later development in the law—comparative negligence. Let it be said that an equally noteworthy development in the law is the broad acceptance of the concept of "strict liability". The Wreck Act is an early example of a strict liability statute. But we can hardly view with dismay today the application of strict liability nor justify a novel and tortured statutory interpretation to avoid the application of strict liability.

If the owner and the government both could prove that they never knew of the location of the sunken barge and that they made diligent and necessary good faith efforts to locate it, they could not be held liable under the Wreck Act. In that narrow circumstance the holding of the majority of the Court would be correct. If it was impossible for the owner or the government to obey the Act, they could not be held liable for violating it. This possibility is not present in this case because the owner's brief reveals the likelihood of some knowledge, and the government does not deny knowledge of the location of the sunken barge.

The majority opinion goes far beyond these narrow circumstances under which the owner or government would not be liable by introducing a concept of negligence into the requirements of marking and removal under the Wreck Act. Instead, escape from liability under that Act is limited wholly to the defense of proving a diligent and good faith attempt to comply with the Act by locating the wreck. That exception no more creates a base of negligence in the Wreck Act

than would the defense of non-ownership by our alleged owner. Another analogy would be a failure to file an income tax return because of a disputed conclusion that there was no obligation to do so. The right to try to establish such a defense does not covert the basic filing obligation to an issue of negligence.

The Wreck Act has a significant public purpose. It places the full and total responsibility of protecting navigation from the hazards of sunken vessels on the owners of those vessels or the United States Government. These two entities wholly failed to carry out their responsibility under the statute. They now undertake to shift that responsibility to the upstream defendants. To allow them to do so is a negation of important congressional policy designed to eliminate such collisions. Allowing the owner or the government to shift liability back to the upstream defendants undercuts the statutory purpose, wholly independent of negligence, of forcing the owner or the government to carry out the obligation to abate navigational hazards.

I cannot accept the judicial legerdemain which creates this new rule of law and overturns an established statutory interpretation. The district court was applying not only the established law but also the manifest congressional policy in holding that the collision of the DAUNTLESS COLOCOTRONIS with the submerged COMBI barge was caused solely by the failure of the owner or the United States Government to carry out statutory obligations recognized for over three-quarters of a century. The decision of the district court should be affirmed.

APPENDIX B

Walter Douglas NUNLEY,

Plaintiff,

v.

M/V DAUNTLESS COLOCOTRONIS, et al.,

Defendants.

UNITED STATES of America and Combi Lines,

Defendants-Appellants,

v.

POINT LANDING, INC., et al.,

Defendants-Appellees.

No. 81-3366

United States Court of Appeals, Fifth Circuit.

Feb. 4, 1983.

Opinion on Granting of Rehearing En Banc April 6, 1983.

Owners of vessel damaged as result of collision with unmarked sunken barge brought action against barge's owners, the United States, and alleged upriver tort-feasors, whose negligence had resulted in sinking of barge three years previously. Upriver tort-feasors were subsequently dismissed from suit. By appropriate pleadings, barge owner and United States asserted demands that upriver tort-feasors indemnify or contribute to them for any damages recovered against them by damaged ship's owners for their failure to mark or

remove barge. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., 513 F. Supp. 720, entered an order granting upriver tort-feasors' motion for judgment on the pleadings. An appeal was taken. The Court of Appeals, Tate, Circuit Judge, held that upriver tort-feasors were not relieved as a matter of law of liability for damages resulting from subsequent collision between unmarked sunken barge and another vessel because of failure of sunken barge's owner or of United States to perform any duties of marking or removing sunken vessel imposed by or consequent to the Wreck Act.

Vacated and remanded.

Jerre S. Williams, Circuit Judge, dissented and filed an opinion.

1. Navigable Waters key 24

Prohibition and scope of Wreck Act, which provides that "[it] shall not be lawful * * * to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels * * *," apply to both owners and nonowners of vessels who intentionally or negligently cause them to sink. Rivers and Harbors Appropriation Act of 1899, §§ 15, 16, as amended, 33 U.S.C.A. §§409, 411.

2. Navigable Waters key 24

Initial upriver tort-feasors, whose negligence allegedly resulted in sinking of barge three years previously, were not relieved as a matter of law of liability for damage resulting from subsequent collision between unmarked sunken barge and another vessel because of failure of sunken barge's owner or of United States to perform any duties of marking or

removing sunken vessel imposed by or consequent to the Wreck Act. Rivers and Harbors Appropriations Act of 1899, §§9 et seq., 15, 16, 19, 20, as amended, 33 U.S.C.A. §§401 et seq., 409, 411, 412, 414, 415.

Debra J. Kossow, Torts Branch, Civ. Div., U.S. Dept. of Justice, Washington, D. C., for defendants-appellants.

Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Fred E. Salley, Estelle E. Mahoney, New Orleans, La., for Combi Lines.

G. Hamp Uzzelle, III, Alex Lankford, III, Mobile, Ala., for Dravo Melching Inc.

Reuter & Reuter, Normand F. Pizza, New Orleans, La., for Zito Fleeting, Inc.

J. Walter Ward, Jr., New Orleans, La., for Zito Fleeting, Zito Towing and Highlands Ins. Co.

John B. Gooch, Jr., New Orleans, La., for Point Landing.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GARZA, TATE and WILLIAMS, Circuit Judges.

TATE, Circuit Judge:

A barge was sunk in 1974 when struck by other vessels that had broken loose from their moorings upstream, allegedly through the negligence of upriver tortfeasors. The sunken vessel was struck three years later, at that time unmarked in presence, by another vessel. The central issue of this appeal is whether the initial tortfeasors are

relieved as a matter of law of liability for damages resulting from the subsequent collision because of the failure of the sunken vessel's owner or of the United States to perform any duties of marking or removing the sunken vessel imposed by or consequent to the Wreck Act.[1] Finding no legislative intent of the Act to relieve the initial tortfeasor of liability under usual principles of maritime law, we reverse the district court's determination that as a matter of law, based on the Wreck Act, the sole proximate cause of the subsequent collision with the sunken vessel was the failure of its owner or of the United States to mark or to remove it.

The Procedural and Factual Context

The present appeal arises out of consolidated litigation that, with regard to the issue before us, concerns the responsibility for damages caused to the M/V DAUNTLESS COLOCOTRONIS ("the Dauntless") when it collided in 1977 with a sunken barge ("the Combi barge"). The barge had been sunk in 1974, through the alleged negligence of the appellee parties ("the upriver defendants"). The Dauntless parties had initially sued (but subsequently dismissed) the upriver defendants, on allegations that their initial negligence (with regard to the sinking of the barge) was causal to the subsequent collision between the Dauntless and the sunken barge. These Dauntless claimants also sued the Combi-barge owners and the United States, contending that their failure to mark or remove the vessel also constituted a proximate cause of the subsequent collision. By

1. Section 15, 16, 19 and 20 (33 U.S.C. §§ 409, 411, 412, 414, and 415) of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. §§401 *et seq.* The Wreck Act imposes a duty upon the owner of a sunken vessel to mark and rise it and, in the event of the owner's default or abandonment, affords the United States certain statutory authority with regard to the sunken vessel.

appropriate pleadings, the Combi owners and the United States asserted demands that the upriver defendants indemnify or contribute to them for any damages recovered against them by the Dauntless claimants for their failure to mark or remove the vessel.

The present appeal is from an order of the district court granting the upriver defendants' motion for judgment on the pleadings. Fed.R.Civ.P. 12(c), h(2). The substance of the motion was that, accepting all well-pleaded allegations as correct neither the Combi owners nor the United States had stated a claim upon which relief could be granted. In granting the motion and dismissing the claims against the upriver defendants, the district court held that conceding their initial negligence in sinking the barge, nevertheless, insofar as the Wreck Act cause of action against the Combi owners or the United States for failure to mark or remove the sunken vessel, these parties could not recover against the upriver defendants because the proximate cause of the subsequent Dauntless collision with this sunken Combi barge was the failure of the Combi owners or the United States to perform marking or removing duties required by the Act. *Nunley v. M/V Dauntless Colocotronis*, 513 F.Supp. 720 (E.D.La. 1981). The Combi owners and the United States appeal this interlocutory admiralty decree. 28 U.S.C. §1292(a)(3).

The motion for judgment on the pleadings for failure to state a claim should not be granted unless it appears beyond doubt that the Combi owners and the United States can prove no set of facts that would entitle them to indemnity or contribution from the upriver defendants if they themselves are held liable to the Dauntless claimants. *Herpich v. Wallace*, 430 F.2d 792, 802 (5th Cir. 1970). Therefore, for

present purposes,[2] we accept the following facts as if established:

> (1) The Combi barge was sunk in 1974 through the negligence of the upriver defendants, and neither the barge nor its owners were at fault;
>
> (2) In 1977 the Dauntless struck and was damaged by the unmarked sunken Combi barge;
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> (3) After the sinking, Combi negligently failed in some respect to mark or remove its sunken barge as required by the Wreck Act;[3]
>
> (4) Likewise, the United States was at fault under the circumstances for failing to continue to mark or else to remove the

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2. The motion for judgment on the pleadings accepts all well-pleaded facts most favorable to the party opposed to the motion. Actually, on the merits, the upriver defendants deny any negligence or even that the Dauntless struck the Combi barge, while both the Combi owners and the United States deny any actionable failure to mark or to remove the sunken barge.

3. The Combi owners argue that the motion-accepted facts should include their allegations that they were free of fault in failing to mark or remove their sunken barge. If so, they would not be liable, and the upriver defendants would be entitled to judgment on the pleadings absolving them from any duty to indemnify or contribute the Combi parties because under the pleadings thus construed no damages would be recovered against them. Under the pleadings, the upriver defendants' duty to indemnify or contribute would only arguably arise if the Combi owners were held liable for a failure to mark or to remove. We therefore so construe the pleadings as most favorably to the latter.

> sunken barge after learning of its presence and initially undertaking to mark it;
>
> (5) The damages at issue are solely those caused the Dauntless claimants through the failure of the Combi owners or the United States to mark or to remove the sunken barge.[4]

The sole issue is whether, under the facts thus posed, the upriver defendants may be required to contribute to or indemnify the Combi owners or the United States for any damages recovered against them by the Dauntless parties based upon fault arising from Wreck Act requirements in failing to mark or to remove the sunken barge, insofar as this failure was a cause of the Dauntless collision with it.

The Wreck Act

[1] The Wreck Act provides that "[it] shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels. . . ." Section 15, 33 U.S.C. 409, 411.[5] The statute's prohibition

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4. By their motion for judgment on the pleadings, the upriver defendants did not seek judgment dismissing any claims against them for the cost of marking or removing the sunken barge. *See Wyandotte Transportation Company v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967).

5. Section 15 of the Wreck Act, 33 U.S.C. §409 states:

> §409. *Obstruction of navigable waters by vessels; floating timber, marking and removal of sunken vessels*
>
> It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a man-

and scope apply to both owners and non-owners of vessels who intentionally or negligently cause them to sink. *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 444 (5th Cir. 1977) *cert. denied*, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111. By the literal terms of the statute, only the owner of the vessel sunk, "*accidentally or otherwise*", *Id.*, has duties to visibly mark it and to remove it. However, the United States Supreme Court has held that the enactment was not intended to make the statutory remedies exclusive, and that under principles of tort liability the negligent non-owner may be liable for the costs of removing the wreck or may be required by the United States through injunctive relief to remove the sunken vessel. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 200–05, 88 S.Ct. 379, 385–87, 19 L.Ed.2d 407 (1967).

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5. Continued

> ner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

Liability for Damages Resulting from Subsequent Collision with Unmarked Sunken Vessel

We are here concerned with the liability for damages resulting from a post-sinking collision with the unmarked wreck of a sunken vessel.[6] The decisions of this circuit make clear that the *owner* of a sunken vessel may be held liable for such damages if he was negligent either in the sinking or the failing to mark-remove the vessel. *Allied Chemical Corporation v. Hess Tankship Co. of Del.*, 661 F.2d 1044, 1060–61 (5th Cir. 1981); *Tennessee Valley Sand & Gravel Company v. M/V Delta*, 598 F.2d 930, 934 (5th Cir. 1979); *Humble Oil & Refining Co. v. The Tug Crochet*, 422 F.2d 602, 609 (5th Cir. 1970). However, where the asserted negligence of the owner is only his failure to perform marking-removing duties, these decisions also recognize that (unlike those in another circuit, *see* text at note *7 infra*) the owner who is not negligent in the sinking

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6. In the ensuing discussion, we will direct our attention exclusively to the owner's duty to mark or remove his sunken vessel, and its effect, if any, upon the residual liability of a non-owner tortfeasor who negligently had caused the vessel to sink. We will not discuss in the text, as unnecessary for disposition of this case, the circumstances in which the United States may share or supersede the owner's responsibility, as, *e.g.*, when it once undertakes to mark but thereafter negligently fails in that undertaking. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 69, 76 S.Ct. 122, 126–27, 100 L.Ed. 48 (1955); *Greer v. United States*, 505 F.2d 90, 92 (5th Cir. 1974). Suffice it to say that, for present purposes, the upriver defendants' defense against the United States is generically similar to its defense against the Combi-barge owners, in that in both instances the upriver defendants contend that the failure to mark relieves them of liability and makes such failure the sole proximate cause of the subsequent collision with the unmarked wreck. The reasons for which we reject the defense against the non-marking owner are the same as those for which we reject the defense against the United States.

may escape liability for non-marking when he "has made a full, good faith search for his craft and cannot find it." *Allied Chemical, supra,* 681 F.2d at 1061.

Until now, however, this circuit has not addressed the issue as to what extent, if any, the *non-owner* whose negligence sank a vessel may be held liable for damages resulting from another vessel's subsequent collision with a sunken wreck that is unmarked.

We observe, preliminarily, that the statutory scheme serves an important function, as noted by the cited decisions. When a danger to navigation is established in the form of a sunken vessel, the cause of which is often obscured by time-consuming multi-party litigation, the statute places a duty on an easily determinable figure, the owner of the wreck, to ensure that the danger of the obstruction is immediately lessened. In this way, the wreck may be marked and removed quickly, thus reducing the chance that it will cause injury to others. However, in keeping with the general principles of maritime tort that an innocent party should not be made to suffer while the party at fault escapes liability, *Wyandotte, supra,* 389 U.S. at 204, 88 S.Ct. at 387, the jurisprudence permits the party that incurs the marking and removal expenses to recover these from the party whose negligence caused the sinking.

Liability for subsequent damage, however, with which we deal here, is different in important respects from liability for marking and removing. Marking-removing liability may easily be seen to be a direct and foreseeable result of the initial negligence that caused the wreck to sink.

Liability for damage resulting from a subsequent collision with an unmarked vessel, however, presents more problems.

Since the Wreck Act places the duty to mark and remove squarely on the shoulders of the *owner* of the wreck, and not on the negligent sinker, it may be said that the failure of the owner to perform this duty is in major part the cause of the subsequent accident—if a wreck has been marked or removed by its owner, its presence does not create as foreseeable a risk of injury as it does when unmarked. Nevertheless, if the wreck had not been negligently caused by the upriver defendants in the first place, it would never have been situated so as to obstruct a navigable waterway, and the duty to mark and remove would never have arisen.

The upriver defendants argue for a rule that the consequences of their negligence stop with their liability for the damages to the sunken vessel itself and for the costs of marking and removing it. They argue that, since they themselves had no duty to mark the wreck, they should not be liable for damages caused by subsequent collisions with the unmarked wreck. Such a rule may indeed be supportable by sound reasons of public policy with regard to allocating risks of harm in maritime commerce. The issue before us, however, is whether the Wreck Act imports such a rule.

In the present instance, the subsequent collision occurred three years after the Combi barge was sunk through the negligence of the upriver defendants. Since judgment was on the pleadings alone, the rule relied upon as a matter of law by the upriver defendants signifies that in all circumstances whatsoever the wrongdoer is insulated from liability for post-sinking collisions with the sunken vessel, a hazard created by his negligence—whether that collision was three years, thirty months, three months, thirty days, three days, or (possibly) even three minutes. Unless we are willing to hold that in no circumstance could the upriver defendants be held liable for damages resulting from the post-accident collision with the

unmarked wreck, judgment on the pleadings was improvidently here granted.

The Wreck Act itself refers only to the duty of an owner to mark a vessel. It does not refer to any liability that subsequently attaches, because of the failure to mark the unsunken wreck, whether the liability be that of the owner or of a negligent non-owner who causes the wreck.

[2] We do not find any intent in the Act to preempt any remedy against a tortfeasor for damages resulting from an unmarked wreck. The remedies and procedures specified by the statute have been held by the United States Supreme Court as "not intended to be exclusive," at least not insofar as the United States government is concerned. *Wyandotte, supra,* 389 U.S. at 200–01, 88 S.Ct. at 385. The courts have, in fact, permitted recovery against a tortfeasor by remedies beyond those specified by the statute. These include recovery from the negligent party for the expenses incurred in marking and removing the wreck, *Id.* at 204, 88 S.Ct. at 387, *Tennessee Valley, supra,* 598 F.2d at 934, and injunctive relief to compel removal of such an obstruction, *Wyandotte, supra,* 389 U.S. at 203–40, 88 S.Ct. at 386–87. As the Court stated, there is "no indication" either in the statutory language itself or "anywhere else–in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law–that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility." *Wyandotte, supra,* 389 U.S. at 200, 88 S.Ct. at 385.

General principles of maritime tort support liability, for at least apportioned damages resulting from post-sinking collisions with the wreck, on the part of the wrongdoer who negligently caused it. "[N]egligent conduct on the navigable waters that causes loss to another constitutes a

maritime tort." *United States v. M/V Big Sam*, 681 F.2d 432, 443 (5th Cir. 1982). Here, where for purposes of the judgment on the pleadings the negligence of the opposing parties is conceded, the causal initial negligence of the up-river defendants that contributed to the later accident would ordinarily require them to bear their apportioned share of the loss. *United States v. Reliance Transfer Co., Inc.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 1715–16, 44 L.Ed. 2d 251 (1975). In *Allied Chemical, supra*, this court recently rejected the contention of a non-owner negligent sinker that a subsequent failure of the owner to mark his vessel constituted a superseding cause of a post-sinking collision, so that the non-owner thus should have been exculpated from liability for damages resulting therefrom. We there noted, although by way of dicta (since we affirmed on another ground), that "[a] subsequent negligent act does not excuse prior negligence." *Allied Chemical, supra*, 661 F.2d at 1060.

No more than could the Supreme Court in *Wyandotte* with regard to a somewhat similar contention of negligent non-owners, are we able to find either in the statutory language or in the legislative history of the Wreck Act–which in terms places criminal liability upon those who negligently cause a wreck in the navigable waters, as well as upon a vessel's owner who fails to mark it–any legislative purpose to relieve the tortfeasor who caused the wreck of his civil liability for the damages consequent to his negligence. Perhaps the failure of other parties to mark the sunken wreck may in some circumstances be a superseding cause of the subsequent collision, or perhaps the tortfeasor's fault may be minimal compared with the fault of the non-marking parties. These, however, are issues that may not be decided by a judgment on the pleadings alone, as in this case.

The Upriver Defendants' Contentions

In rejecting the above view, the district court held that by virtue of the Wreck Act "the only proximate cause of a collision between a wreck and another vessel" is "the failure to mark and/or remove the vessel." 513 F.Supp. at 726.

In so holding, and in thus exculpating the upriver defendants of liability for their pre-sinking negligence, the district court relied upon decisions from the Second Circuit,[7] which it correctly construed as indicating that "the *only* relevant duty to the victim of a subsequent collision with a sunken wreck is the duty of the owner to mark and remove the wreck. The proceding breach of duty by the original tortfeasor which led to the sinking of the wreck is irrelevant for purposes of determining liability for the later accident." 513 F.Supp. at 723. For the reasons previously stated, we are not persuaded by these decisions that the Wreck Act intended to exculpate negligent non-owners who cause a wreck of the civil consequences of their negligence under maritime tort law, nor that the Act intended to make the owner's failure to mark/remove a sunken vessel the sole proximate cause of any post-sinking collision with the wreck.

With regard to these Second Circuit decisions, we further observe that they in part are a corollary of that circuit's rule that imports an almost strict liability upon the sunken

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7. *Lowery v. The Tug, Ellen S. Bouchard*, 128 F.Supp. 16 (N.D. N.Y. 1955), *aff'd* 229 F.2d 436 (2d Cir. 1956); *Red Star Towing & Transportation Co. v. Woodburn*, 18 F.2d 77 (2d Cir. 1927); *The R. J. Moran*, 299 F.500 (2d Cir. 1924); *The Anna M. Fary*, 153 F. 866 (2d Cir. 1907); *American Commercial Barge Line Co. v. Eagel Marine Industries, Inc.*, 1977 A.M.C. 475 (E.D. Mo. 1976) (relying on the Second Circuit decisions).

vessel's owner for his failure to mark the vessel, whether or not he has actually had an opportunity to do so. In application of the Second Circuit rule and its corollary, a victim who is caused loss by a post-sinking collision is not deprived of a remedy for his damages, for he may always look to the non-marking owner for their payment.

The rule in this circuit differs, however: As earlier noted, the owner may be relieved of his liability to mark if he is faultless in failing to do so. When the wreck is unmarked through the non-negligent owner's completely faultless inability to locate it, its danger to water traffic (essentially created through the negligence of the non-owner who sank it) is just as great as if the owner himself had failed to mark it although knowing of its location; yet the owner of the unmarked vessel is not liable for subsequent damages. In such a circumstance, if indeed we now in the face of our own rule also adopt the Second Circuit's corollary that insulates the original tortfeasor who caused the wreck from liability for post-sinking collisions, a victim of the subsequent collision would be without remedy against either the tortfeasor or the faultless owner, which "would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim." *Wyandotte, supra,* 389 U.S. at 204, 88 S.Ct. at 387.

Nor are we persuaded that an interpretation of the Wreck Act as not insulating the initial tortfeasor from liability will somehow defeat or erode or be inconsistent with its statutory purpose of providing for certainty as to who is responsible to mark immediately a sunken vessel. The desired goal, *i.e.*, that the vessel be marked as soon as possible, is aided so long as the owner is aware that he faces potential liability for any negligent failure to do so. We are unable to see that this goal

is impeded by the circumstance that, if the owner fails to mark his sunken vessel, the original tortfeasor who sank it may be called upon to share the damages that may result from a subsequent collision with the unmarked vessel.

Conclusion

We find no statutory purpose expressed or implied by the Wreck Act to insulate as a matter of law a tortfeasor who negligently sinks a vessel from liability for damages resulting from a post-sinking with the unmarked wreck thereof. Accordingly, we VACATE the judgment dismissing on the pleadings the claims of the Combi owners and of the United States against the upriver defendants, and we REMAND this case for further proceedings consistent with the views here expressed.

VACATED AND REMANDED.

JERRE S. WILLIAMS, Circuit Judge, dissenting:

The facts of the case are fully and accurately set out in the majority opinion and need not be repeated in detail here. The motor vessel DAUNTLESS COLOCOTRONIS collided with the sunken barge, owned by Combi Lines, over three years after the barge had sunk. It is not disputed that for purposes of this case the so-called "upriver" defendants, various operators of fleeting facilities for barges, were negligent in causing the sinking of the Combi-owned barge. It is assumed for purposes of this decision, as the majority did assume, that either Combi Lines or the United States Government or both are negligent because of violation of 33 U.S.C. §409 (the statute popularly known as the Wreck Act) for having failed to mark or remove the sunken barge when it had sunk "in such a manner as to obstruct, impede, or

endanger navigation."[1]

It is this failure to act by the owner of the barge or the United States Government which compels my dissent to the holding of the majority. Succinctly stated, if the owner of the barge and the United States Government had carried out their clear obligations under the Wreck Act, the DAUNTLESS would not have collided with the barge. Under the Wreck Act, the negligence of the upriver defendants did not play any role under the law, therefore, in "causing" the collision of the DAUNTLESS with the barge.

It is clear in the law that the upriver defendants because of their negligence were responsible for the costs of marking or removing the sunken barge. This is conceded, and these claims have been settled with Combi and others. The issue is whether they continue to be liable after more than three years for damage to the DAUNTLESS caused by the collision, because, and solely because, of the failure of Combi and the United States Government to carry out their obligations under the statute.

The majority opinion insists that because this was a motion for summary judgment to absolve the upriver defendants, we must assume the same rule if the hazard created by the negligence caused the collision "three years, thirty months, three months, thirty days, three days, or (possibly) even three minutes" before the collision. And as supporting this sweeping view, I read the opinion of the district court to rely upon a firm and flat rule that the upstream defendants could never be responsible for damages in the case of a subsequent collision no matter how quickly it followed after the negligent sinking. I do not agree with this extreme

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1. The text of the applicable section of the Act, §409, is printed in full in footnote 6 of the majority opinion.

application of the statute. Nor do I agree with the majority of this Court holding that the negligent actors may be liable throughout history for the results of their negligence when the Wreck Act requires the owner or United States Government to obviate the hazard. Under the well-pleaded facts of this case, allegations to which there is no dispute, this collision occurred more than three years after the negligent act caused the sinking.

A sensible interpretation and application of the Wreck Act requires that the owner and the government have a reasonable time to carry out their duties of marking and removal under the statute before their failure to do so would become the sole cause of a subsequent collision. But the issue of whether there was a reasonable time does not arise in this case.[2] Perhaps, it might be argued the case should be returned for trial if such a pragmatic rather than absolute rule is applied. The trouble with doing so is that we already know the critical fact—the long delay in clear and overt violation of the Wreck Act on the part of Combi and the United States Government. Under these circumstances, a trial would be without purpose. Whatever the result of an interpretation and application of a reasonable rule, and a reasonable opportunity for Combi and the United States Government to act, they were in clear statutory default under the known facts of this case.

In my view Judge Learned Hand in the United States Court of Appeals for the Second Circuit confirmed the correct law in this kind of case many years ago. In *Red*

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2. Also not arising in this case is the freedom of the owner from application of the rule when the sunken vessel cannot be located after a full and faithful search. It is properly held in such a case that the non-negligent owner is not liable for failure to carry out the duties required by the Wreck Act. *Allied Chemical Corp. v. Hess Tankship Co. of Del.* 661 F.2d 1044, 1061 (5th Cir. 1981).

Star Towing and Transportation Co. v. Woodburn, 18 F.2d 77, 79 (2nd Cir. 1927), Judge Hand in referring to the Wreck Act said:

> The statute establishes a new duty arising after the sinking, and demanding as its condition nothing but the fact and notice of it to the wreck owner. Though the tug be a guilty party to the original mishap, the duty is not ordinarily upon her to provide against further loss; the statute imposes the duty upon the owner alone, and absolves the tug from subsequent consequences, which conceivably might otherwise be thought to be the proximate result of her original fault.

And then, if the owner does not carry out its obligations, the duty under the Wreck Act falls squarely on the United States Government.

This rule has been consistently followed.[3] It must be stressed that no case to the contrary is cited in the majority opinion or in the briefs, and none has been found in any circuit court. The case upon which the majority of the Court relies, *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), holds only that those who negligently cause the sinking of a vessel are financially responsible for the costs of removal. This is

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3. The interpretation which I urge was first established only a few years after the Act was passed in 1899, *The Anna M. Fahy*, 153 F. 866 (2nd Cir. 1907), and has been consistently followed in the Second Circuit. In addition to *Red Star Towing*, *see*, *e.g.*, *Lowery v. The Tug Ellen S. Bouchard*, 128 F.Supp. 16 (N.D.N.Y. 1955), *aff'd on opinion of trial court*, 229 F.2d 436 (2nd Cir. 1956).

obviously a holding which follows the statutory scheme, as the upriver defendants concede. It is consistent with the established rule as the quotation from the opinion in *Red Star Towing, supra*, shows. The fallacy is in going beyond the sinking to make the negligent non-owners responsible for damage to the vessel which later collides with the sunken barge. For this there is no authority in the law. No prior holding exists which supports the majority opinion. I cannot concur in abandoning all prior precedent and creating a wholly new interpretation of the Wreck Act after 84 years.

The Second Circuit also has developed a rule that the owner under the Wreck Act has a positive obligation to remove the sunken vessel rather than abandon it. I agree with the majority opinion that this rule is not correct. It does not follow the wording of the statute. But I do not agree that this rule is the underpinning of the *Red Star Towing* rule. The two rules are not directly related. It is not necessary in this case to consider at all the relative responsibilities of Combi and the United States Government under the Wreck Act. It is clear from the Act that one or the other has the obligation to mark or remove, but in any event to eliminate the hazard to navigation caused by the sunken vessel.

The Wreck Act has an important purpose. It places the full and total responsibility of protecting navigation from the hazards of sunken vessels on the shoulders of the owners and the United States Government. These two entities, having totally failed in their responsibilities under the statute, now undertake to shift that responsibility to the upstream defendants. I can read this only as an escape not authorized by the statute and as a negation of important congressional policy designed to eliminate such collisions.

While I do not agree in full with the reasoning of the

district court, because it established a rule which does not yield to reasonableness, its awarding of a summary judgment holding the upstream defendants not liable in this case was in my view clearly correct and should be affirmed by this Court.

ON SUGGESTION FOR REHEARING
EN BANC

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

Walter Douglas NUNLEY,

Plaintiff.

v.

M/V DAUNTLESS COLOCOTRONIS, her engines, tackle, apparel, etc., and 364,321 Barrels of Arabian Light Crude Oil in rem,

Defendants.

Civ. A. No. 77-3886.

United States District Court, E. D. Louisiana.
April 20, 1981.

Owners and operators of vessel which sank when it struck a second barge filed complaint against United States and several negligent nonowners responsible for sinking of original vessel and against owners and operators of original vessel. Owners of original vessel and the United States brought claims against negligent nonowners for indemnity and/or contribution should judgment be entered against them in favor of owner of second vessel. Negligent nonowners filed motion for judgment on the pleadings on ground that they were not responsible for damage to second vessel occasioned by it striking the first vessel. The District Court, Cassibry, J., held that while the United States and owner of sunken barge may have valid claim for cost of removing vessel against negligent nonowners responsible for sinking of vessel, they did not have claim for destruction of second vessel or its cargo caused by its collision with the second barge.

Ordered accordingly.

1. Navigable Waters key 24

Duty to mark sunken vessel pursuant to Wreck Act includes the duty to make all reasonable efforts to find wreck. Rivers and Harbors Appropriation Act of 1899, § § 9 et seq., 15, 33 U.S.C.A. § § 401 et seq., 409.

2. Navigable Waters key 24

Under the Wreck Act, the only relevant duty to victim of subsequent collision with a sunken wreck is the duty of the owner to mark and remove the wreck. Rivers and Harbors Appropriation Act of 1899, § § 9 et seq., 15, 33 U.S.C.A. § § 401 et seq., 409.

3. Navigable Waters key 24

Section of the Wreck Act governing duty placed upon owner of second vessel makes the only proximate cause of a collision between a wreck and another vessel the failure to mark and/or remove the wreck. Rivers and Harbors Appropriation Act of 1899, § §9 et seq., 15, 33 U.S.C.A. § § 401 et seq., 409.

4. Navigable Waters key 24

While the United States and owner of sunken barge may have valid claim for cost of removing sunken barge against negligent nonowners responsible for sinking vessel, they did not have a claim for destruction of second vessel or its cargo caused by its collision with a sunken barge. Rivers and Harbors Appropriation Act of 1899, § §9 et seq., 15, 33 U.S.C.A. § § 401 et seq., 409.

Alfred M. Farrell, Jr., Hugh R. Straub, Terriberry, Carroll, Yancey & Farrell, New Orleans, La., for Sea Unity Shipping, S.A.

Charles Hanemann, Henderson, Hanemann & Morris, Houma, La., for Tenneco Oil Co.

Debra J. Kossow, Washington, D. C., for United States.

Fred E. Salley, New Orleans, La., for Combi Lines.

Alex F. Lankford, III, G. Hamp Uzzelle, III, Mobile, Ala., for Dravo Mechling.

Machale A. Miller, New Orleans, La., for Point Landing, Inc.

J. Walter Ward, Jr., New Orleans, La., for Zito Fleeting, Inc. & Zito Towing, Inc.

Lemle, Kelleher, Kohlmeyer & Matthews, W. E. Noel, New Orleans, La., for Walter Douglas Nunley.

McGlinchey, Stafford & Mintz, John E. Galloway, New Orleans, La., for Tenneco Oil Co.

CASSIBRY, District Judge:

MOTION FOR JUDGMENT ON THE PLEADINGS

This motion raises the intriguing question whether the negligent parties responsible for the sinking of a vessel can be made responsible for the damage resulting from subsequent collisions with the sunken wreck. In particular, it

raises the question of the effect of the Wreck Act,[1] a statute recently described in a Fifth Circuit opinion as "impossibly obscure",[2] upon an already complicated tortious causation problem. I conclude that notwithstanding its drafting handicaps, the Wreck Act does relieve the negligent non-owners of responsibility for any subsequent collisions with the wreck.

The tortured chain of events in this case began on or about January 16, 1974 when there was a major breakaway of barges at locations along the east and west banks of the Mississippi River. As a result of this breakaway the Combi Lines Barge, CBLL–01315 (hereinafter referred to as the Combi barge) sank at approximately mile 88.4. On July 22, 1977 over three years later, the M/V Dauntless Colocotronis (hereinafter referred to as the Colocotronis) allegedly struck the Combi barge, resulting in a constructive total loss of the ship. The owners and operators of the Colocotronis filed a complaint against the United States and several of the upriver defendants including movants. They alleged that the negligent sinking of the Combi barge by the upriver defendants and/or the failure to mark or remove the barge by the United States led to the destruction of the Colocotronis. The owners and operators also filed a claim against Combi Lines in its limitation action alleging that it was responsible for the damage to the Colocotronis due to its ownership of the barge and its failure to mark or remove it. Finally, both Combi Lines and the United States brought claims against

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1. 33 U.S.C. §401 et seq. (1970) (originally enacted as Act of Mar. 3, 1899, ch. 425, 30 Stat. 1151 et seq.). Sections 15, 16, 19 and 20, 33 U.S.C. §§409, 411, and 415 are collectively known as the Wreck Act. Section 15 of the Wreck Act hereinafter is referred to according to its place in the Rivers and Harbors Act, 33 U.S.C. §409.

2. *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438 (5th Cir. 1977).

the upriver defendants for indemnity and/or contribution should judgment be entered against them in favor of the Colocotronis.

The upriver defendants have brought this motion for judgment on the pleadings on the ground that they are not responsible for the damage to the Colocotronis occasioned by the Colocotronis striking the Combi barge. They do not contest at this time the separate claim by the United States for reimbursement of expenses allegedly incurred in connection with marking and removing the Combi barge. Nor do they contest at this time Combi Lines' claim for the loss of its barge and the claim of the owner of the cargo on the barge arising from the original barge breakaway. Instead, for purposes of this motion they admit the well-pleaded averments of the United States and Combi Lines–i.e., that the upriver defendants negligently caused the sinking of the Combi barge which was later struck by the Colocotronis.[3]

Any consideration of this question must begin with an analysis of Section 15 of the Rivers and Harbors Act, 33 U.S.C. § 409, part of the Wreck Act, which specifically considers the problems of sunken vessels in navigable channels. It provides in relevant part:

> . . . And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed

3. The owners and operators of the Colocotronis do not oppose this motion.

> or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418 and 502 of this title.

[1] Although the Wreck Act itself is a criminal statute, Section 409 also represents a legislative determination of the standard of care placed on the owner of a wreck in a civil action. *Morania Barge No. 140, Inc. v. M. & J. Tracy, Inc.*, 312 F.2d 78 (2d Cir. 1962); *American Commercial Barge Line Company v. Eagle Marine Industries, Inc.*, 1977 A.M.C. 475 (E.D.Mo. 1976). It clearly places the responsibility for marking and raising the sunken vessel on the owner of the vessel.[4] Sections 409 and 414 of the Wreck Act also charge the Coast Guard and the Corps of Engineers with certain duties and responsibilities with regard to marking and removing wrecks.

[2] Although the language of Section 409 does not specifically relieve the party responsible for the original sinking of subsequent damage occasioned by a later collision with the wreck, every court that has considered the issue since the inception of the Act has reached such a conclusion. *The Anna M. Fahy*, 153 Fed. 866 (2d Cir. 1907); *The R. J. Moran*, 299 Fed. 500 (2d Cir. 1924); *Red Star*

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4. The duty to mark includes the duty to make all reasonable efforts to find the wreck. *See Berwind-White Coal Company v. Pitney*, 187 F.2d 665 (2d Cir. 1951); *The Snug Harbor*, 40 F.2d 27 (4th Cir. 1930).

Towing & Transportation Co. v. Woodburn, 18 F.2d 77 (2d Cir. 1927); *Lowery v. The Tug. Ellen S. Bouchard*, 128 F.Supp. 16 (N.D.N.Y. 1955), *aff'd. on opinion of trial court*, 229 F.2d 436 (2d Cir. 1956); *American Commercial Barge Line Company v. Eagle Marine Industries, Inc.*, 1977 A.M.C. 475, *supra*. Those cases indicate that under the Wreck Act, the *only* relevant duty to the victim of a subsequent collision with a sunken wreck is the duty of the owner to mark and remove the wreck. The preceding breach of duty by the original tortfeasor which led to the sinking of the wreck is irrelevant for purposes of determining liability for the later accident.

In the *Anna M. Fahy, supra*, the canal boat FAHY sank at 9:30 a. m. when the tugs OVERBROOK and MEDIA negligently towed her upon the rocks. Subsequently, at 6:00 p. m. the same day, the tug BULLEY ran upon the sunken wreck, which had not been removed or marked, and was damaged. On these facts, the court exonerated the tugs and their owners that negligently caused the canal boat to sink, and held the canal boat's owner solely responsible for plaintiff's tow. In reaching this result the court observed that §15 of the Wreck Act (subsequently codified as 33 U.S.C. §409) placed the duty to mark and remove on the owner of the wreck. In construing the statute to exculpate the owners of the vessels responsible for wrecking the FAHY, the court stated:

> The Tugs Overbrook and Media are undoubtedly liable to the owner of the Fahy for their negligence in towing her upon the rocks, but are they liable to the Bulley for failure to mark the wreck? The district judge thought not and we are inclined to agree with him.

> The statute places the duty to mark upon the owner and no one else; there is no divided responsibility and, if the statute is to be effectual, there cannot be. *Id.* 153 F. at 867–68.

The court did discuss the possibility that under extraordinary circumstances the parties responsible for the sinking might have a duty to *mark* the wreck:

> We do not intend to hold that conditions may not arise where a duty is imposed upon a tug to mark a wreck caused by her negligence. It may well be, where all representatives of the owner are drowned or where communication with him is impossible from any cause, a duty rests upon the tug to mark the wreck. No such situation arises in the case at bar. There was nothing to prevent the owner from marking the wreck; the tugs knew this and were justified in assuming that the owner would act as he was commanded to act by law. *Id.* at 868.

However, it never considered the possibility that in the absence of negligence by the owner to mark his vessel, the original tortfeasors would be held liable because of their responsibility *for the original sinking.*

In the *R. J. Moran, supra*, the factual situation was substantially more complex, but the legal holding pertinent to the present motion was the same. The scow 9–S, in tow of the tug R. J. Moran, collided with a steamship and sank. Fifteen minutes later, the tug J. C. Hartt struck the sunken scow and was damaged. The owner of the tug J. C. Hartt filed suit against the sunken scow and against the tug R. J.

Moran. The owner of the scow impleaded the steamship and her tugs, and the owner of the tug R. J. Moran successfully petitioned for limitation of liability. The district court concluded that the R. J. Moran had been solely at fault for the collision and the sinking, and divided the limitation fund between the owner of the scow and the owner of the tug J. C. Hartt which struck the scow.

The Second Circuit affirmed the decree in favor of the owner of the J. C. Hartt against the owner of the scow, but reversed the judgment dividing the limitation fund for the tug R. J. Moran. The court held that the owner of the R. J. Moran, which had negligently sunk the scow, was not liable to the owner of the tug J. C. Hartt which hit the scow after the sinking. The court concluded:

> It was not the duty of the tugs towing the [steamship] to mark the wreck of the sunken vessel. That obligation was placed by statute on the owner of the sunken craft. 30 Stat. 1152; Compiled Statutes, §9920 [Now 33 U.S.C. §409]. This court has held that duty is upon the owner and no one else, and that there is no divided responsibility; the reason being that, if the statute is to be effectual, there cannot be. *Id.* 299 Fed. at 503.

As in *Fahy*, the court discussed liability on the part of the Moran for the damage to the J. C. Hartt on account of some possible duty to *mark* the wreck when such action by the owner would have been impossible. Again, however, there is no suggestion in the opinion that the Moran would be held liable for the damage to the J. C. Hartt on account

of its responsibility for the original sinking.[5]

Perhaps the most articulate expression of this interpretation of the Wreck Act came from Judge Learned Hand in *Red Star Towing & Transportation Co. v. Woodburn*, 18 F.2d 77, *supra*. The case presents an unusual coincidence in that the libelant, Red Star, which owned the tug Stamford which was towing the barge Joe when the barge Joe struck the sunken barge Hayward, was also the owner of the tug Portchester which had negligently sunk the barge Hayward two days before. The trial court had awarded the libelant only one-half of its provable damages after concluding that the libelant was at fault for failing to give proper information as to the whereabouts of the sunken barge Hayward.

The Second Circuit, in an opinion by Judge Hand, reversed and awarded the libelant full damages. In reaching his conclusion, Judge Hand clearly identified his reasoning:

> As to the libelants' liability, we differ with the learned District Judge. It must be remembered that the tugs do not share in the duty to mark the wreck, whatever their fault for causing it. The libelants were therefore not liable for failing to secure more information than they had, nor were they responsible that that information turned out to be misleading. They reported what they had from the master, and were not charged

5. In the present case the three and one half years between the sinking of the Combi barge and the subsequent collision rules out the possibility that the parties responsible for the sinking had an immediate duty to mark the wreck because the owner did not have time between the sinking and the collision to find and mark the wreck.

with getting more, or with the truth of what they did get, in the absence of deceit, which is not suggested.

So far as we know, this is the first case in which the libelant is the same party which has suffered by the very wreck which his own negligence occasioned, and at first blush it appears that he should bear his part of the ensuing loss, to which he so contributed. *However, a tug which negligently sinks a vessel is not liable to failing to mark it, or because the second collision is a proximate consequence of the first fault.* A tugowner is no more responsible for the eventual collision, when he himself suffers from his earlier fault, than when another is the victim. The statute establishes a new duty arising after the sinking, and demanding as its condition nothing but the fact and notice of it to the wreck owner. Though the tug be a guilty party to the original mishap, the duty is not ordinarily upon her to provide against further loss; the statute imposes the duty upon the owner alone, and absolves the tug from subsequent consequences, which conceivably might otherwise be thought to be the proximate result of her original fault. 18 F.2d at 79. (Emphasis supplied; citation omitted).

Red Star clearly states that the *only proximate cause* of a collision between a sunken wreck and another vessel is the failure to mark. The prior negligence of the person responsible for the sinking is irrelevant. As the cases indicate, there

are sound policy reasons for such an approach. By clearly designating a party responsible for the duty to mark and remove and making that responsibility the only relevant duty in the case of a subsequent collision, the statute encourages the expeditious marking and removal of wrecks. Unless that duty is placed firmly upon the owner (and in some instances the government) the parties involved will not act while they dispute who was responsible for the original sinking. The two subsequent cases interpreting § 409, like their predecessors, reflect this judgment and absolve the original tortfeasor of any responsibility for the subsequent collision.[6] *Lowery v. The Tug Ellen S. Bouchard, supra; American Commercial Barge Line Co. v. Eagle Marine Industries, Inc., supra.*

The United States and Combi Lines argue that the decision of the Supreme Court in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), and the decision of the Fifth Circuit in the University of Texas Medical Branch at *Galveston v. United States*, 557 F.2d 438, *supra*, alter the rule set out in the cases discussed above and make the prior tortfeasor liable for any damage resulting from its negligence in the original sinking. In *Wyandotte*, two consolidated cases were involved. In the first, the government sought a declaratory judgment that the allegedly negligent owners of two sunken barges were responsible for removing the barges from a navigable river.

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6. There is language in *American Commercial Barge* that the branch of duty on the part of the owner and another party "served to supercede" the original tortfeasor's negligence. This statement suggests that the original tortfeasor might be held responsible for the subsequent accident if the owner and the government were not negligent in attempting to mark and remove the wreck. While I recognize that this is a possible interpretation of the Act, I believe that the *Red Star Towing* interpretation, which places the exclusive duty upon the owner to avoid further loss, is preferable since it simplifies the issue of liability and makes the removal of obstructions more likely.

In the second, the government sought reimbursement for the costs of removing a sunken barge. It brought an in rem action against the sunken barge and its cargo and an in personam action against both the barge's owner and the negligent parties responsible for the barge's sinking. The district court granted summary judgment against the government's in personam suits and held that the United States was limited to an in rem recovery against the sunken vessels and their cargoes. The Fifth Circuit reversed the trial judge, finding that the abandonment remedy is only available to non-negligent owners of vessels. The Supreme Court affirmed. It held that §409 impliedly gave the government the right to bring an in personam action for the cost of removal against both negligent owners and non-owners of wrecks.

In *University of Texas Medical Branch at Galveston v. United States, supra,* the Fifth Circuit interpreted *Wyandotte* to "stand for the proposition that the United States must be afforded complete relief against the parties responsible for the sinking." *Id.* 557 F.2d at 447. Accordingly, it held that the Limitation of Liability Act does not apply to the right of the government to recover the cost of removing a wreck from the parties negligently responsible for the sinking.

Counsel for the United States and Combi Lines read *Wyandotte* and *University of Texas Medical Branch* for the general proposition that negligent sinkers of vessels should be held fully responsible for *all* the consequences of their action. In particular, they point to language in *Wyandotte*, reiterated in *Medical Branch*, that the denial of relief to the government "would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim." *Wyandotte, supra,* at 204, 88 S.Ct. at 387.

The United States and Combi Lines conclude that if the negligent parties responsible for the sinking of the vessel can be forced to pay for the removal of the vessel, they should also have to pay for the damage resulting from a later collision between the wreck and another vessel.

Yet that argument, while appealing at first sight, ignores the purpose of the Wreck Act—to keep the navigable channels free of obstructions. If, as Combi Lines and the government contend, the negligent sinker of a vessel was responsible not only for the cost of removal, but also for the subsequent damage occasioned by a future collision, there would be no incentive on the owner (or the government in the case of abandonment) to mark and remove the wreck other than the criminal penalties provided in the Wreck Act itself. And as the *Wyandotte* case itself recognized, those penalties by themselves are inadequate to insure compliance with the Act. *Wyandotte, supra,* 389 U.S. at 202, 88 S.Ct. at 386. Only by making the owner responsible for subsequent damage does the statute create any real incentive to remove obstacles from navigation. Moreover, the equity argument that is so powerful in *Wyandotte* and *Medical Branch* is considerably weakened in the present context. Instead of simply paying for the cost of removing the ship it negligently sank, the original tortfeasor would now be required to pay for the damage resulting from a subsequent collision—an accident which would not have occurred if the vessel had been marked and/or removed. I do not believe that equity "compels" such a result.

[3, 4] In conclusion, I find that §15 of the Wreck Act makes the only proximate cause of a collision between a wreck and another vessel, the failure to mark and/or remove the wreck. Accordingly, while the United States and Combi Lines may have valid claim against the upriver defendants

for the cost of removing the Combi barge, they do not have a claim for the destruction of the Colocotronis or its cargo caused by its collision with the Combi barge.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-3366

D.C. Docket No. CA-77-3886-E, ET AL.

WALTER DOUGLAS NUNLEY,
Plaintiff,

versus

M/V DAUNTLESS COLOCOTRONIS, ET AL.,
Defendants.

* *

UNITED STATES OF AMERICA and COMBIL LINES,
Defendants-Appellants,

versus

POINT LANDING, INC., ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the
Eastern District of Louisiana

Before CLARK, Chief Judge, and BROWN, GEE, RUBIN, GARZA., REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges*.

JUDGMENT ON REHEARING EN BANC

These causes came on to be heard on rehearing en banc with oral argument;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by the Court that the opinion entered by a panel of this Court on February 4, 1983, vacating the judgment of the District Court in these causes be, and the same are hereby, reversed and remanded to the said District Court for further proceedings consistent with this opinion;

IT IS FURTHER ORDERED that the defendants-appellees pay to the defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.

March 19, 1984

WILLIAMS, Circuit Judge, with whom GEE, Circuit Judge, joins, dissenting.

ISSUED AS MANDATE:

*Judge Garza, now a senior judge of this circuit, is participating as a member of the panel initially deciding the appeals now subject to en banc review. Judge Davis was not a member of the court when these cases were submitted to the court en banc and did not participate in the consideration of this decision.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3366

WALTER DOUGLAS NUNLEY,
Plaintiff,

versus

M/V DAUNTLESS COLOCOTRONIS, ET AL.,
Defendants.

* * * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA and COMBI LINES,
Defendants-Appellants,

versus

POINT LANDING, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ORDER:

[] The motion of _____
for [] stay [] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

[] The motion of _____
for [] stay [] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of

this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

[x] The motion of appellee, DRAVO MECHLING, INC., for a further stay of the issuance of the mandate is GRANTED to and including June 17, 1984, under the same conditions as set forth in the preceding paragraph.

[ ] The motion of appellee, DRAVO MECHLING, INC., for a further stay of the issuance of the mandate is DENIED.

/s/ E. Grady Jolly
UNITED STATES CIRCUIT JUDGE
E. GRADY JOLLY

Office-Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 83-2061

In the Supreme Court of the United States

OCTOBER TERM, 1984

DRAVO MECHLING, INC., ET AL., PETITIONERS

v.

COMBI LINES AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a person whose negligence causes a vessel that he does not own to sink in navigable waters may be liable for damages arising from a subsequent collision with the vessel.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2061

DRAVO MECHLING, INC., ET AL., PETITIONERS

v.

COMBI LINES AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A35) is reported at 727 F.2d 455. The panel opinion (Pet. App. A36-A56) is reported at 696 F.2d 1141. The opinion of the district court (Pet. App. A57-A71) is reported at 513 F. Supp. 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. A72-A73) was entered on March 19, 1984. The petition for a writ of certiorari was filed on June 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 15 of the Rivers and Harbors Act of 1899 (33 U.S.C. 409) provides in pertinent part:

> It shall not be lawful * * * to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels * * *. And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

STATEMENT

1. As alleged in the pleadings, a barge owned by respondent Combi Lines (Combi) sank in the Mississippi River in 1974 as a result of petitioners' negligence (Pet. App. A5). The unmarked wreck was struck three years later by the M/V Dauntless Colocotronis (Dauntless) (*id.* at A5-A6). In consolidated actions in the United States District Court for the Eastern District of Louisiana, the owners and operators of the Dauntless sought recovery against petitioners, claiming that the damage to the Dauntless was caused by petitioners' negligence in sinking the Combi barge, and against Combi and the United States, claiming that their negligence in failing to mark or remove the barge caused the accident involving the Dauntless. The United States and Combi filed third-party complaints against

petitioners seeking contribution or indemnity.[1] *Id.* at A6, A26-A27.

2. Petitioners moved for judgment on the pleadings, arguing that Section 15 of the Rivers and Harbors Act of 1899 (33 U.S.C. 409) precludes the imposition of damages liability on a person who negligently causes a vessel that he does not own to sink, when another vessel subsequently collides with the sunken vessel.[2] The district court agreed, ruling that the duty imposed by Section 15 on the owner of a sunken vessel to mark or remove the wreck makes "[t]he preceding breach of duty by the original tortfeasor which led to the sinking of the wreck * * * irrelevant for purposes of determining liability for the later accident" (Pet. App. A63). The United States[3] and Combi appealed pursuant to 28 U.S.C. 1292(a)(3).[4]

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[1] Combi also tendered petitioners as defendants pursuant to Fed. R. Civ. P. 14(c). See note 4, *infra*.

[2] The motion did not seek to dismiss the claims of the United States for the cost of removing the sunken barge (Pet. App. A27 n.12).

[3] The court of appeals (Pet. App. A16) and petitioners (Pet. 5 n.3) properly note that the motion for judgment on the pleadings did not require a determination of whether the United States could be liable to the owners and operators of the Dauntless on the facts of this case, which have not yet been developed (see Pet. App. A28-A29).

[4] The Dauntless interests have voluntarily dismissed their claims against petitioners without prejudice (Pet. App. A26 n.10). The possibility of plaintiffs' recovery directly from petitioners remains, however, because petitioners were tendered by Combi to plaintiffs as defendants under Fed. R. Civ. P. 14(c) (Pet. App. A26-A27 & n.11, A28). See generally 3 *Moore's Federal Practice* para. 14.34 (2d ed. 1984). Petitioners' suggestion (Pet. 12) that their liability to plaintiffs is no longer at issue is therefore incorrect. It is in any event irrelevant to the question presented, which concerns whether petitioners are, as a matter of law, freed of all liability by Section 15. As the court below recognized (Pet. App. A28-A29), this issue does not require a determination at this time of whether petitioners' liability, if any, may flow directly to plaintiffs or instead to Combi and the United States.

3. The court of appeals, sitting en banc, reversed (Pet. App. A1-A29).[5] Citing *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), the court reasoned that Section 15 was not intended to shield from damages liability a person who negligently causes a vessel to sink (Pet. App. A15). The court did not read a line of Second Circuit cases decided before *Wyandotte Transportation* to compel a contrary result (Pet. App. A17). It also noted that general principles of maritime and land-based tort law support the conclusion that whether the failure to mark a wreck is a superseding cause and whether the initial sinking of the vessel is a proximate cause of the later collision with the wreck are questions of fact in each particular case, not questions of law suitable for decision on the pleadings (*id.* at A20-A26, A29 n.14).

ARGUMENT

The court of appeals correctly interpreted Section 15 in light of this Court's decisions in *Wyandotte Transportation Co.* v. *United States, supra*, and *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960). While the decision below arguably is inconsistent with a 50 year-old decision of the Second Circuit, that court has not yet had an opportunity to reconsider its position in light of *Wyandotte Transportation* and *Republic Steel*, and no other court of appeals has decided the issue. Any conflict that may exist is, accordingly, of little practical significance at this time. For these reasons, review by this Court is unwarranted.[6]

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[5]Two judges dissented on grounds similar to those set forth by the district court (Pet. App. A29-A35). A divided panel of the court of appeals had vacated the judgment of the district court (*id.* at A36-A56).

[6]Whatever the merits of petitioners' contentions, they are not yet ripe for review by this Court. The court of appeals reversed the district court's ruling that petitioners are entitled to judgment on the pleadings, and remanded for further proceedings. There has as yet been no determination that petitioners are subject to any liability on the facts of this

1. a. Section 15 by its terms prohibits any person from negligently causing a vessel to sink in navigable waters, whether or not he owns the vessel (see *Wyandotte Transportation,* 389 U.S. at 199 n.11). It also requires that the owner of a sunken vessel mark its location and remove it; a failure to remove the wreck is considered an abandonment permitting the United States to remove it. In *Republic Steel,* the Court concluded (362 U.S. at 492) that appropriate remedies may be implied under the Act to protect the government's interest in maintaining the navigable capacity of the nation's waterways. In *Wyandotte Transportation,* the Court applied this reasoning in rejecting an argument that the express statutory remedies for violation of Section 15's prohibition against negligent sinking preclude all other remedies against a culpable nonowner (389 U.S. at 200-201):

> [O]ur reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others. There is no indication anywhere else — in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law — that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. We therefore hold that the remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive.

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case. See page 7 note 7, *infra.* If petitioners prevail at trial, their contentions will be moot. If, on the other hand, petitioners are held liable for damages, and that determination is affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. For this reason as well, review by this Court is unwarranted.

The Court concluded (389 U.S. at 204) that the government could obtain a declaration that those who negligently sink a vessel, including nonowners (*id.* at 199 n.11), are responsible for removing the wreck, or could recover from them its own cost of removing it. "Denial of such * * * remed[ies]," the Court reasoned (*id.* at 204), "would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim."

b. The decision below is firmly grounded in the teachings of *Wyandotte Transportation* and *Republic Steel.* Section 15 does not explicitly prohibit the imposition of civil liability on a person who negligently sinks a vessel he does not own. Nor can it seriously be contended in light of these precedents that the remedies provided under the Act necessarily preclude such liability. To the contrary, the government's right to recover its own losses from one who causes a vessel to sink may fairly be implied from the Act itself. See *Wyandotte Transportation,* 389 U.S. at 204; *Republic Steel,* 362 U.S. at 492. Moreover, the duties created by Section 15 are not inconsistent with — and so do not implicitly displace — the traditional maritime tort of negligence, which subjects a tortfeasor to liability for his apportioned share of a loss caused by his negligence. See generally *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975); *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 413 & n.6 (1953); *United States* v. *M/V Big Sam,* 681 F.2d 432, 443 (5th Cir. 1982); *Burgess* v. *M/V Tamano,* 564 F.2d 964 (1st Cir. 1977), cert. denied, 435 U.S. 941 (1978).

Imposing liability on the person who negligently sinks a vessel will not, as petitioners suggest (Pet. 12-15), reduce the incentives of the owner to mark and remove the wreck, resulting in a lower level of navigational safety than would

exist in the absence of such liability.[7] Those incentives remain intact, for the owner is not only subject to criminal penalties for violating Section 15, he is also subject to liability for his share of any damage caused by a collision with the wreck. Where he has clearly failed to perform his duties, that share will no doubt usually be substantial. It would be foolhardy indeed for an owner to neglect his statutory duties merely on the chance that his liability for subsequent collisions may be reduced in an unknown amount by damages that might be imposed on the person responsible for the sinking. Furthermore, subjecting negligent persons who sink vessels to a share of liability for resulting losses will serve as a deterrent to the careless conduct that causes sinkings in the first place. This is of course fully in harmony with the Act's safety-related purposes and with its prohibition of intentional and negligent sinkings.

2. In *Red Star Towing & Transportation Co.* v. *Woodburn,* 18 F.2d 77 (2d Cir. 1927), the court held that the owner of a sunken vessel who had not marked the wreck even though he had an opportunity to do so was liable for the full amount of damages sustained by a vessel that struck

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[7]Petitioners also appear to suggest (Pet. 13), by their reliance on language taken from *University of Texas Medical Branch* v. *United States,* 557 F.2d 438, 450 (5th Cir. 1977), cert. denied, 439 U.S. 820 (1978), that it would somehow be unfair to subject them to liability. But the language they quote from that case addresses the applicability of the Limited of Liability Act of 1851, 46 U.S.C. 181 *et seq.*, which depends upon whether an act occurred with the shipowner's "privity or knowledge" (46 U.S.C. 183(a)), not the question of whether any liability at all may be imposed without such knowledge. In any event, there is surely nothing unfair in holding a tortfeasor responsible for losses caused by his own wrongful conduct. See *Wyandotte Transportation,* 389 U.S. at 204. Moreover, the decision below holds only that petitioners are not relieved of liability as a matter of law by Section 15; petitioners remain free to argue in the district court that their negligence was not, on the facts as they may be developed, a proximate cause of the damage to the Dauntless (Pet. App. A29 n.14).

the wreck. Damages were not reduced even though the owner of the damaged vessel also owned the vessel that caused the initial sinking. In reaching this result, the court emphasized that a person who sinks a vessel he does not own has no duty under Section 15 to mark the wreck (18 F.2d at 79). This statement was supported by Second Circuit precedent. See *The Anna M. Fahy,* 153 F. 866, 867 (1907) (person who caused sinking is not liable "for failure to mark the wreck"); *The R.J. Moran,* 299 F. 500, 503 (1924). The court went on to state, without citation of authority, that the sole duty under Section 15 of one who sinks a vessel is to notify its owner, and that therefore "a tug which negligently sinks a vessel is not liable to subsequent craft which may foul the wreck * * * because the second collision is a proximate consequence of the first fault" (18 F.2d at 79). The court may well have based this remark on the facts before it, and concluded that the owner's failure to mark the wreck under the circumstances there presented cut off the chain of proximate causation with respect to the initial sinking. On this reading, *Red Star Towing* does not conflict with the decision below: the question of proximate cause here has not yet been addressed (see Pet. App. A29 n.14).

To the extent that *Red Star Towing* may be interpreted as holding, as a matter of law, that Section 15 precludes the imposition of liability on one who negligently sinks a vessel he does not own even where proximate causation has been established, it is in conflict with the decision below.[8] But the

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[8]None of the other cases relied upon by petitioners (Pet. 5) directly conflicts with the decision below. The other Second Circuit cases, *The Anna M. Fahy, supra, The R.J. Moran, supra,* and *Lowery* v. *The Tug Ellen S. Bouchard,* 128 F. Supp. 16 (N.D.N.Y 1955), aff'd on opinion below, 229 F.2d 436 (1956), all addressed the question of whether liability could flow from a nonowner's failure to mark a wreck, not from his negligence in sinking the vessel. And in the other decision cited by petitioners as in conflict, *American Commercial Barge Line Co.* v.

Second Circuit's view of Section 15 in 1927 as creating the sole corpus of duties relevant to sunken vessels can no longer be regarded as sound in light of this Court's subsequent decisions in *Republic Steel* and *Wyandotte Transportation*, which hold that the remedies provided in the Act are not exclusive (see pages 5-6, *supra*). The holding in *Wyandotte Transportation* that nonowners may be declared responsible for or required to bear the cost of removing vessels sunk through their negligence invalidates the premise of *Red Star Towing*, which was that Section 15 "absolves the [person who has sunk a vessel he does not own] from subsequent consequences" (18 F.2d at 79). It would be premature for this Court to assume that the Second Circuit would now adhere to *Red Star Towing*.

The existence of any meaningful conflict between the circuits is accordingly only speculative at this time. Moreover, the small volume of reported cases on the matter suggests that the issue is not so significant as to require this Court's immediate attention. Finally, the decision below

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Eagle Marine Industries, Inc., 1977 A.M.C. 475 (E.D. Mo. 1976), the court held on the facts before it that the sinking was not a proximate cause of the collision with the wreck because the owners' failure to mark "served to supersede [the initial] negligence" (*id.* at 485). The district court's later quotation (*id.* at 485-486) in dictum of language from *Red Star Towing* hardly warrants review of the decision below. Petitioners' reliance (Pet. 9-10) on *Inland Tugs Co.* v. *Ohio River Co.*, 709 F.2d 1065 (6th Cir. 1983), is also misplaced. The court there held that the owner of a sunken vessel could not delegate his duty to mark the wreck to the United States, and determined that, on the facts presented, the absence of a marking buoy "appears to have been the sole cause of the collision" (709 F.2d at 1072). The court did not question its conclusion in *Ingram Corp.* v. *Ohio River Co.*, 505 F.2d 1364, 1369-1371 (6th Cir. 1974), that the defendant's negligence there in sinking a barge and in failing to mark it proximately caused a collision with the sunken vessel. The court of appeals in the instant case properly relied on *Ingram* (Pet. App. A25-A26 & n.9) in support of its conclusion that the initial negligence involved in sinking a vessel is not irrelevant to a determination of liability for a subsequent collision with the wreck.

reaches an eminently sensible result: Section 15, which prohibits the negligent sinking of vessels, does not exempt a person who negligently sinks a vessel that he does not own from the normal rules governing maritime torts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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